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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MAY 26, 2020

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[1]Sworn in 30 April 2019. [2]Sworn in 26 April 2019. [3]Died 28 August 2015. [4]Died 3 May 2015. [5]Died 30 January 2017. [6]Died 4 January 2015. [7]Died 27 January 2015. [8]Died 11 September 2015. [9]Resigned 24 March 2019. [10]Retired 1 April 2019.

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COURT OF APPEALS

CASES REPORTED

FILED 16 OCTOBER 2018

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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APPEAL AND ERROR

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SCHEDULE FOR HEARING APPEALS DURING 2020

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks:

January 6 and 20 (20th Holiday)

February 3 and 17

March 2, 16 and 30

April 13 and 27

May 11 and 25 (25th Holiday)

June 8

July None Scheduled

August 10 and 24

September 7 (7th Holiday) and 21

October 5 and 19

November 2, 16 and 30

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

BRENNAN STATION 1671, LP, PLAINTIFF

v.

MICHAEL BOROVSKY, GOLDSMITH LLC D/B/A MB GOLDSMITHS AND MICHAEL BOROVSKY, DEFENDANTS / THIRD-PARTY PLAINTIFFS

v.

KIMCO REALTY CORPORATION, CHINA COURT CHINESE RESTAURANT, INC., AND CHINA COURT, INC., THIRD-PARTY DEFENDANTS

No. COA18-184

Filed 16 October 2018

1. Landlord and Tenant—breach of contract—foul odor and mold—judgment notwithstanding the verdict

The trial court properly denied plaintiff-landlord's motion for judgment notwithstanding the verdict on its breach of contract claim in a commercial landlord-tenant dispute. Although there was evidence that defendant-tenants breached their lease, they presented at least a scintilla of evidence—that plaintiff had failed to remedy the sources of a foul odor and mold problem—in support of their counterclaim for constructive eviction.

2. Landlord and Tenant—constructive eviction—jury instructions—language of lease and relevant law

The trial court's omission of plaintiff-landlord's preferred phrasing from its jury instructions did not amount to a misstatement of law where the instructions tracked the language and provisions of the lease agreement and reflected the relevant law of constructive eviction.

3. Landlord and Tenant—constructive eviction—foul odor and mold—judgment notwithstanding the verdict

In a commercial landlord-tenant dispute, the trial court erred by granting plaintiff-landlord's motion for judgment notwithstanding the verdict to overturn the jury's verdict and award on defendant-tenants' counterclaim for constructive eviction. Defendant-tenants presented at least a scintilla of evidence that plaintiff-landlord had breached the lease by not remedying the sources of a foul odor and mold problem upon defendant-tenants' adequate and repeated notices of the problem.

4. Landlord and Tenant—constructive eviction—lost profits—after vacating premises—question for jury

In a commercial landlord-tenant dispute, the trial court erred by instructing the jury that it could award damages only for defendant-tenants' lost profits through the date defendant-tenants vacated the leased premises. Because defendant-tenants could prove their lost profits after vacating the premises with reasonable certainty, the issue should have been before the jury.

Appeal by plaintiffs from judgment and orders entered 13 October 2017 and 17 October 2017, respectively, by Judge Anderson D. Cromer in Wake County Superior Court. Heard in the Court of Appeals 20 September 2018.

The Law Office of John T. Benjamin, Jr., P.A., by John T. Benjamin, Jr. and Aleksandra E. Anderson, for plaintiff-appellant/cross-appellee.

Mark Hayes and Nicholls & Crampton, P.A., by Adam M. Gottsegen, for defendant-appellee/cross-appellant.

TYSON, Judge.

Brennan Station 1671, LP ("Plaintiff") appeals from an order entered upon a jury's verdict denying Plaintiff's claims against Michael Borovsky, Goldsmith, LLC d/b/a MB Goldsmiths, and Michael Borovsky (collectively "Defendants"), finding in favor of Defendants' claims, and awarding Defendants $60,000.00 on their counterclaim. Plaintiff also appeals the trial court's order denying its motion for judgment notwithstanding the verdict finding Defendants not liable. Defendants cross-appeal the trial court's granting of Plaintiff's motion for judgment notwithstanding

the verdict setting aside the jury's verdict on their counterclaim and the trial court's limits on the scope of lost profits recoverable by Defendants.

I. Background

Defendants agreed to lease 1,238 square feet of premises located in Brennan Station Shopping Center in Raleigh, North Carolina, to operate a jewelry store ("premises"). In March 2011, Defendants entered into a lease agreement with GRE Brennan Station LLC for an initial term of three years and four months. Defendants were required to pay monthly installments of minimum annual rent and additional rent due and payable on the first day of each month. Defendant Michael Borovsky signed a personal guaranty agreement for the lease. In November 2011, GRE Brennan Station LLC sold the shopping center to Plaintiff, who became the successor-landlord under the lease agreement.

On 25 February 2014, Defendants sent an email to Plaintiff's property management company, Kimco Realty Corporation ("Kimco"), complaining they were "still getting a bad odor" inside the store. Kimco sent an employee to the store, but the smell had dissipated prior to his arrival.

On 23 April 2014, Defendants exercised their option to renew the term under the lease agreement and executed a first amendment to the lease. This amendment extended the lease term for three years, from 1 September 2014 through 31 August 2017, and then extended the term for an additional seven years, from 1 September 2017 through 31 August 2024. On that same date, Defendants wrote a letter to Plaintiff's property manager, complaining about the "toxic sewage smell" that had been plaguing the store "for the past several months to about a year[.]" In their brief, Plaintiff asserts it has no record of this letter.

Beginning in September 2014, Defendants began keeping a record of the presence of the foul smells inside the jewelry store and of the actions being taken. Defendants also kept a log of customers who acknowledged a "strong odor of sewage like smell."

In November 2014, Kimco contracted with a plumber to inspect the premises and investigate the smell. The plumber identified multiple possible causes of the sewage smell including degraded wax seals in the toilets in Defendants' premises and the adjacent Chinese food restaurant ("China Court"), and a possible clogged or deficient grease trap located outside behind the two properties. The plumber recommended a smoke test be performed to locate potential sewer gas leaks and the source or cause of the odor.

Defendants sent a letter dated 16 December 2014 to Plaintiff, detailing the issues with the sewage odor, the property management's attempts to remedy the issue, and the loss of business because of the foul smell inside the store. Defendants referenced Article 22 of their lease, Quiet Enjoyment, and requested "someone from [Plaintiff's] legal department" to contact them "to discuss a resolution of this ongoing problem, including a rent reduction" to remedy for the loss of sales and profits. Plaintiff asserts there was no record of receipt of this letter either, and questions how the envelope was purported to include a copy of the lease agreement when the weight on the receipt indicated it was one ounce.

Defendants retained counsel, who sent another letter dated 14 January 2015. This letter complained of mold in the jewelry store and included a mold report. The letter also mentioned the issue of the sewage smell and its negative impact upon the jewelry business. Defendants' counsel asserted these issues violated Plaintiff's obligations under Article 22 of the lease agreement to provide Defendants with the right of quiet enjoyment. Defendants' counsel proposed rent abatement or an early termination of the lease as remedies for the violations.

By 26 January 2015, the toilets inside Defendants' premises and China Court were fixed and the grease trap was cleaned. A smoke test was conducted at the jewelry store and China Court and revealed no evidence of sewer gas leaks. Kimco indicated they had "no other ideas to remedy" the sewage smell.

On 12 February 2015, general counsel for Kimco sent a letter in response to Defendants' counsel's 14 January 2015 letter. The letter denied Plaintiff was in breach of the lease because Defendants had been continuously operating the business inside the premises. Further, Kimco asserted the operative article of the lease on the landlord's obligations would be Article 13, which details Plaintiff's duties to repair and maintain the property. The letter advised Defendants of their obligations and need to specify what repair obligation Plaintiff had failed to remedy, and their requirement to provide written notice of such obligation before Plaintiff would be considered in breach of the lease.

Further, the letter stated Plaintiff had inspected the areas it was responsible to maintain under the lease, the exterior walls and structural columns, and found no issues to address. Defendants were directed to look into the areas they were responsible for as tenant to maintain under the lease for potential sources of the odor and mold.

Defendants' counsel responded in writing on 23 February 2015, and asserted Defendants' inability to peacefully enjoy the premises due to the daily issue of mold and the "horrible odor." The letter listed the numerous occasions Defendants had complained in writing, both via email and first-class mail, but also indicated: "please accept this [letter] as our client's written notice of the maintenance obligation of the landlord to remediate the mold in the premises." The letter reasoned the mold was due to "high moisture levels, which would have been caused by water intrusion in the exterior walls, as is the typical cause for the presence of mold."

On 11 March 2015, a roofing company was sent to inspect and repair the roof over the jewelry store. The roofer identified three holes in the membrane of the roof and found water had been entering the building. The holes in the roof were repaired and the area was cleaned. On 3 April 2015, Defendants' counsel sent a letter to China Court, to provide written notice of the issues with the mold and the odor and to assert the responsibility of China Court and Plaintiff for the damage.

On 1 June 2015, Defendants' counsel sent a certified letter to Plaintiff indicating the enclosed rent check for June would be Defendants' final rent payment. Defendants indicated they would vacate by the end of the month. Kimco's general counsel replied in an email noting the failure of Defendants to "provide anything to [Kimco or Plaintiffs] indicating it [was their] responsibility" to repair any damage, and that by leaving the premises Defendants would be in breach of the lease.

Defendants made no additional rent payments after 1 June 2015. Plaintiff sent a notice of default on 11 August 2015. This notice indicated Defendants' defaulted by nonpayment of rent and failure of the tenant to continuously operate in the premises throughout the lease period.

Plaintiff filed its complaint on 2 September 2015, and asserted claims for breach of lease and breach of guaranty agreement. Defendants filed an answer and counterclaims against Plaintiff for breach of contract, constructive eviction, unfair or deceptive trade practices, negligence, and breach of covenant of good faith and fair dealing. Defendants also asserted third-party claims against both Kimco and China Court.

Plaintiff filed a motion to dismiss. Defendants' counterclaims for unfair or deceptive trade practices and negligence were dismissed. Kimco's motion to dismiss Defendants' claims against it was granted. Defendants voluntarily dismissed their claims against China Court.

The case went to trial on 18 September 2017. Each party timely moved for directed verdict at the close of the opposing side's evidence,

and both motions were denied. The jury returned a verdict in favor of Defendants on both Plaintiff's claims and Defendants' counterclaims and awarded Defendants $60,000.00 in damages.

Plaintiff filed a motion for judgment notwithstanding the verdict ("JNOV"). The trial court granted Plaintiff's JNOV motion setting aside Defendants' counterclaims against Plaintiff and the jury award of damages, and denied the motion regarding Plaintiff's claims against Defendants. Both Plaintiff and Defendants timely appealed.

II. Jurisdiction

An appeal of right lies with this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2017).

III. Plaintiff's Appeal

Plaintiff argues the trial court erred (1) in denying the portion of Plaintiff's JNOV concerning its claims for breach of lease and breach of guaranty against Defendant, and (2) in instructing the jury on the elements of constructive eviction.

A. Judgment Notwithstanding the Verdict

1. Standard of Review

[1] The standard of appellate review for a JNOV is *de novo*. *Austin v. Bald II, L.L.C.*, 189 N.C. App. 338, 342, 658 S.E.2d 1, 4 (2008). The proper inquiry upon review of a JNOV is "whether the evidence was sufficient to go to the jury." *Tomika Invs., Inc. v. Macedonia True Vine Pentecostal Holiness Church of God, Inc.*, 136 N.C. App. 493, 499, 524 S.E.2d 591, 595 (2000) (citation omitted). "The hurdle is high for the moving party as the motion should be denied if there is more than a scintilla of evidence to support the [nonmovant's] *prima facie* case." *Id.* (citation omitted). A "[j]udgment notwithstanding the verdict should be granted only when the evidence is insufficient as a matter of law to support the verdict." *Beal v. K. H. Stephenson Supply Co.*, 36 N.C. App. 505, 507, 244 S.E.2d 463, 465 (1978).

2. Breach of Contract

Plaintiff argues all elements of its breach of contract claims against Defendants were established by stipulations and evidence presented at trial, and once Defendants' claims were disposed of, the trial court should have granted Plaintiff's motion for JNOV.

"The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Poor*

v. Hill, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000) (citation omitted). Breach of a contract with unambiguous terms is a question of law for the trial courts, which may be decided on a directed verdict. *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 661, 464 S.E.2d 47, 56 (1995).

Before trial, the parties stipulated to the existence of a valid contract:

> (a) [Defendants] entered into a Shopping Center Lease with GRE Brennan Station LLC on March 19, 2011 for the lease of a commercial space located in Suite 123 of Brennan Station Shopping Center;
>
> (b) [Defendant] Michael Borovsky signed an Absolute Unconditional Guaranty Agreement to GRE Brennan Station LLC guarantying payment for all amounts owed under the Shopping Center Lease by [Defendant] MB Goldsmiths;
>
> (c) [Defendants] executed a First Amendment to Lease . . . on April 23, 2014 extending the . . . Lease through August 31, 2024. . . .

As listed in Article 18 of the lease agreement, Defendants would be in breach of the lease if:

> (a) any part of the Rent required to be paid by Tenant under this Lease shall at any time be unpaid beyond any applicable grace period;
>
> . . .
>
> (c) Tenant fails, after the date on which it is required by this Lease to open the Premises for business with the public, to be open for business as required by this Lease, or Tenant vacates or abandons the Premises[.]

As part of their pretrial stipulations, the parties also stipulated to conduct that would be a breach under the lease:

> (h) Defendants vacated . . . in June 2015;
>
> (i) The last payment of rent made by Defendant to Plaintiff was on June 1, 2015[.]

While elements of Plaintiff's breach of contract claim were present in the pretrial stipulations, the trial court did not err in denying Plaintiff's motions for directed verdict or JNOV. Motions for JNOV are held to high standards, and there was at least a scintilla of evidence to

support Defendants' claim for constructive eviction. *See Tomika Invs.*, 136 N.C. App. at 499, 524 S.E.2d at 595.

B. Jury Instructions

[2] Plaintiff argues the jury instructions concerning constructive eviction confused the jury and misstated the law on the elements of the constructive eviction claim.

1. Standard of Review

Challenges to the form and phrasing of jury instructions are reviewed for an abuse of discretion, but challenges that raise questions of law are reviewed *de novo*. *Geoscience Grp., Inc. v. Waters Constr. Co.*, 234 N.C. App. 680, 686, 759 S.E.2d 696, 700 (2014).

"[T]his Court considers a jury charge contextually and in its entirety." *Hammel v. USF Dugan, Inc.*, 178 N.C. App. 344, 347, 631 S.E.2d 174, 177 (2006) (citation omitted). "[I]t is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury." *Robinson v. Seaboard Sys. R.R., Inc.*, 87 N.C. App. 512, 524, 361 S.E.2d 909, 917 (1987) (citation omitted).

2. Constructive Eviction Instruction

No pattern jury instructions exist for constructive eviction. Plaintiff submitted the proposed instruction on that issue:

> Did the Plaintiff Landlord breach the Lease Agreement by failing to remediate the water leak amounting to a breach of the express covenant of quiet enjoyment resulting in a constructive eviction of the tenant Defendant MB Goldsmith[s] from the premises in accordance with applicable law and the Lease Agreement, as Amended?
>
> On this issue, the burden of proof is on the [Defendants].
>
> Constructive eviction occurs when a breach of a contractual duty by a landlord deprives its tenant of that beneficial enjoyment of the premises to which he is entitled under his lease, causing his tenant to abandon the leased premises. In other words, constructive eviction takes place when a landlord's breach of duty under the lease renders the premises untenable. (Citations and internal quotation marks omitted).

> This means that the Defendants must prove, by the greater weight of the evidence, four things:
>
> First, that the Plaintiff had a duty under the terms of the Lease Agreement to repair or remedy any mold or foul odor caused by a water leak from the neighboring tenant space formerly occupied by China Court restaurant.
>
> Second, that the Plaintiff breached a duty under the Lease Agreement by failing to repair or remedy any mold or foul odor caused by a water leak from the neighboring tenant space formerly occupied by China Court restaurant.
>
> Third[,] that the Plaintiff's failure to repair or remedy any mold or foul odor, deprived the Defendants of the beneficial use and enjoyment of the Premises Leased by [Defendants] which were unsuitable for the purposes for which they were leased.
>
> Fourth, that the Defendant Tenant vacated possession of the Leased Premises within a reasonable time after the occurrence of the water or moisture intrusion into the Leased Premises.

Instead of using Plaintiff's proposed elements, the trial court instructed the jury on the following elements:

> First, that Plaintiff, Brennan Station, had a duty under the terms of the Lease Agreement not to hinder or interrupt the [Defendants'] peaceable and quiet enjoyment of the Premises;
>
> Second, that Plaintiff breached that duty under the Lease Agreement;
>
> Third[,] that Plaintiff's breach of that duty deprived Defendants of the beneficial use and enjoyment of the Premises Leased by [Defendants] and that they were rendered untenable for the purposes for which they were leased; and
>
> Fourth, that Defendant Tenant vacated possession of the leased premises within a reasonable time after the occurrence of the hindrance or interruption of the Landlord.

Plaintiff timely objected to the trial court's version of the elements of quiet enjoyment, which was overruled. Plaintiff asserts the trial

court's changes to the first two elements misconstrue North Carolina law on constructive eviction by removing the "two-step" requirement that the jury first find a breach of a specific lease agreement provision before finding the landlord's breach forced a tenant to vacate.

The language provided in the trial court's instructions follows the express covenant of quiet enjoyment contained in the lease agreement: "Tenant shall peaceably and quietly hold and enjoy the Premises for the Term without hindrance or interruption by Landlord[.]" Further, the instructions given indicate the jury needed to find Plaintiff had a duty under the lease and breached that duty, the same finding as asserted in Plaintiff's requested instructions.

The trial court's omission of Plaintiff's preferred phrasing is not a misstatement of law, but is a matter to be reviewed for abuse of discretion. *See Geoscience Grp.*, 234 N.C. App. at 686, 759 S.E.2d at 700. Plaintiff has failed to show the trial court abused its discretion in giving the jury instructions, which track the language and provisions of the lease agreement, and reflect the relevant law of constructive eviction. *See Marina Food Assocs.*, *Inc. v. Marina Restaurant*, *Inc.*, 100 N.C. App. 82, 92, 394 S.E.2d 824, 830 (1990) ("when a landlord breaches a duty under the lease which renders the premises untenable, such conduct constitutes constructive eviction"). Plaintiff's argument is overruled.

IV. Defendants' Cross-Appeal

Defendants argue the trial court erred in: (1) granting Plaintiff's JNOV motion concerning Defendants' claims of constructive eviction setting aside the jury's verdict; and, (2) ruling at the charge conference that the trial court would instruct the jury it could only award damages for lost profits through 2015.

A. Judgment Notwithstanding the Verdict

1. Standard of Review

[3] Plaintiff moved for JNOV. As previously stated the standard of review requires: "if there is more than a scintilla of evidence to support [Defendants] *prima facie* case," the motion should be denied. *Tomika Invs.*, 136 N.C. App. at 499, 524 S.E.2d at 595. "[T]he trial court must view all the evidence that supports the non-movant's claim as being true and that evidence must be considered in the light most favorable to the non-movant, giving to the non-movant the benefit of every reasonable inference that may legitimately be drawn from the evidence with contradictions, conflicts, and inconsistencies being resolved in the

non-movant's favor." *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 369, 329 S.E.2d 333, 337-38 (1985) (citation omitted).

2. Constructive Eviction

Many of the issues before us hinge upon the applicability of the law of constructive eviction, and whether Plaintiff, Defendants, or a third party had a duty to remedy the foul odor and mold inside the premises Defendants leased.

> An act of a landlord which deprives his tenant of that beneficial enjoyment of the premises to which he is entitled under his lease, causing the tenant to abandon them, amounts to a constructive eviction. Put another way, when a landlord breaches a duty under the lease which renders the premises untenable, such conduct constitutes constructive eviction. Furthermore, a lease includes the implied covenant of quiet enjoyment. Where a lessee has been constructively evicted, the covenant of quiet enjoyment has also been breached.

Marina Food Assocs., 100 N.C. App. at 92, 394 S.E.2d at 830 (citations omitted).

Plaintiff asserts it had no obligation under the lease to remedy the foul odor inside Defendants' premises. Article 13.1 of the lease agreement states:

> LANDLORD'S DUTY TO MAINTAIN. Landlord will keep the exterior walls, structural columns and structural floor or floors (excluding outer floor and floor coverings, walls installed at the request of Tenant, doors, windows, and glass) in good repair. Notwithstanding the foregoing provisions of this Section, Landlord shall not in any way be liable to Tenant on account of its failure to make repairs unless Tenant shall have given Landlord written notice and afforded Landlord a reasonable opportunity to effect the same after such notice.

Article 13.2 lists Defendants' maintenance duties as tenant, and indicates Defendant was responsible to repair "interior walls . . . the interior portions of exterior walls . . . pipes and conduits within the Premises . . . pipes and conduits outside the Premises between the Premises and the service meter[.]"

Plaintiff asserts the cause of the mold and the foul smell was a water leak from China Court between two interior walls of the building, and was beyond its obligation under the lease. However, under the strict requirements of a JNOV, if a scintilla of evidence supports Defendants' prima facie case, the JNOV is properly denied. At trial, Defendants presented other evidence and theories of potential sources and causes of the foul odors and mold damage, including an exterior wall, demising wall between two tenants, a faulty grease trap, and a leaking roof.

Defendants presented and admitted testimony by James Spangler, an environmental assessment expert, to detail how China Court's exterior grease trap could have caused the odor inside Defendants' store. The grease trap was located outside of the premises near the back parking lot. The grease trap uses pipes to transfer the wastewater out of the restaurant and filter out the grease. Sewage had been found in the grease trap on previous occasions. Spangler testified China Court's grease trap had settled, possibly leading to odors being able to travel back up the pipes and into the premises. Spangler also identified significant holes in the demising wall between the jewelry store and China Court, possibly allowing the smell to enter into Defendants' business.

Whether or not this shared wall between the premises and China Court was a structural or demising wall, or an interior wall, and fell under Defendants' or Plaintiff's responsibility under the lease, was a question for the jury. Further, under the terms of the lease, Defendants were not responsible for maintaining the exterior grease trap or for the integrity of the roof.

Plaintiff, through its management company, pumped the grease trap after Defendants began complaining of the odor in the jewelry store. After the grease trap was pumped, Defendants still complained of odor. Plaintiff sent a roofing company to look for possible damage in the roof, and the company repaired three holes in the roof. Viewed in the light most favorable to Defendants, this evidence was sufficient to support a jury's verdict in favor of Defendants. *See McNamara v. Wilmington Mall Realty Corp.*, 121 N.C. App. 400, 406, 466 S.E.2d 324, 328 (1996).

The plaintiff in *McNamara* leased a space in a mall to operate a jewelry store. *Id.* at 403, 466 S.E.2d at 326-27. The plaintiff was informed an aerobics studio would be moving in next door, and it would be required to install soundproofing to prevent excessive noise in the plaintiff's space. *Id.* After multiple complaints of noise by the plaintiff, the defendant-landlord installed more insulation, claimed it had remediated the problem and considered the matter "closed." The landlord also

demanded the rent payments, which had been deposited in an escrow account pending resolution of the issue, be released. *Id.* The plaintiff did not pay the rent and abandoned the premises. *Id.*

The plaintiff then initiated an action "for breach of contract based upon the theories of constructive eviction and breach of the covenant of quiet enjoyment." *Id.* Though the plaintiff had asserted two theories of recovery, the question submitted to the jury was, "Did the [d]efendant . . . breach the lease agreement with the [p]laintiff?" *Id.* at 405, 466 S.E.2d at 328. A jury found in favor of the plaintiff, and the trial court denied the defendant-landlord's motion for JNOV. *Id.* at 404, 466 S.E.2d at 327.

This Court held the trial court did not err in denying the defendant's JNOV for either of the plaintiff's claims. This Court stated that the facts and evidence, "viewed in the light most favorable to plaintiff [the non-moving party], constituted sufficient evidence to support a jury finding that plaintiff abandoned the premises within a reasonable time and that the abandonment was the result of defendant's failure to remedy the noise from the studio." *Id.* at 406, 466 S.E.2d at 328.

The defendant argued the terms of the express covenant of quiet enjoyment overrode any implied rights. This Court disagreed and found that if the defendant "took no action regarding plaintiffs complaints" received after the defendant had installed the additional insulation, "then for purposes of plaintiff's claims, defendant's failure to abate the noise constituted a constructive eviction as of that time." *Id.* at 407, 466 S.E.2d 329.

Plaintiff argues the constructive eviction counterclaim fails unless Defendants can point to an express obligation under the lease it breached. Plaintiff cites to *Charlotte Eastland Mall, LLC v. Sole Survivor, Inc.* to support its assertion. The defendants in that case entered into a lease with the plaintiff to open a shoe repair business in the mall. 166 N.C. App. 659, 660, 608 S.E.2d 70, 71 (2004). Two years prior to the end of the lease term, the defendants abandoned the premises and ceased rent payments. *Id.* The plaintiff filed suit and the defendants asserted an affirmative defense. *Id.* at 661, 608 S.E.2d at 71. The trial court granted the plaintiff's motion for summary judgment. *Id.*

On appeal, the defendants argued the trial court erred because "there was a material issue of fact regarding whether [p]laintiff's failure to provide adequate security negated [d]efendants' obligation to pay rent[.]" *Id.* at 661, 608 S.E.2d at 72. The defendants asserted the plaintiff's "failure to provide security was a breach of its duty to provide a 'safe environment', an explicit breach of plaintiff's duties under the

lease, and a breach of the implied covenant of 'quiet enjoyment.' " *Id.* at 662, 608 S.E.2d at 72.

This Court rejected the defendants' arguments, as the lease specifically stated the plaintiff could elect to provide security for the mall, *at its discretion*. *Id.* at 663, 608 S.E.2d at 73. This Court also rejected the defendants' argument that the lack of provided security led to their constructive eviction, stating "defendants have failed to show that plaintiff breached any duty under the lease." *Id.* at 664, 608 S.E.2d at 73.

This case is distinguishable from *Charlotte Eastland Mall*. As previously stated, sufficient evidence was presented to support a jury's finding Plaintiff had breached the lease in not remedying the sources of the foul odor and mold problem. Plaintiff's lease does not include a conditional obligation or option to repair structural damage or to maintain the roof and exterior, as was the case for the landlord's *discretion* to provide security as in *Charlotte Eastland Mall*.

Finally, Plaintiff asserts Defendants did not provide adequate notice of default under the lease. Article 19.1 of the lease agreement states, in relevant part:

> LANDLORD'S DEFAULT. Except as otherwise provided in this Lease, Landlord shall be in default under this Lease if Landlord fails to perform any of its obligations hereunder and said failure continues for a period of thirty (30) days after written notice thereof from Tenant to Landlord (unless such failure cannot reasonably be cured within thirty (30) days and Landlord shall have commenced to cure said failure within said thirty (30) days and continues diligently to pursue the curing of the same).

Plaintiff argues Defendants' notice only informs Plaintiff of the existence of mold, but failed to point to any specific breach by Plaintiff. Further, Plaintiff argues mold and odor are not Plaintiff's responsibilities under Article 13, and Plaintiff argues Defendants were aware any of the purported causes of the mold and odor were their responsibility.

Upon review of the extensive record in this case, Defendants provided adequate and repeated notices to Plaintiff of the ongoing foul odor and mold problems. Several letters were sent, and though Plaintiff purports to not have received the early letters, Plaintiff was certainly aware of the issue and their property manager responded, sent personnel, and began investigating the source of the foul smell as early as February 2014.

In February 2015, Plaintiff asserted in a letter it had inspected all areas it was responsible to maintain under the lease, but the roof was not repaired until March 2015, and the holes in the shared demising wall for the premises and China Court were first mentioned by James Spangler, when he inspected the premises in late June and late August 2016. Plaintiff had ample and specific notice of the ongoing problems in Defendants' premises. Plaintiff's arguments are overruled.

Defendants presented sufficient, and certainly a scintilla of, evidence to defeat the high standard to grant Plaintiff's JNOV motion. The trial court erred in granting the JNOV to overturn the jury's verdict and award on Defendants claims for constructive eviction. We reverse and reinstate the jury's verdict and damages and the judgment entered thereon. The trial court's order left open the issue of attorney's fees and costs for Defendants. We remand for a determination of the costs and fees, if any, Defendants are entitled to recover.

B. Jury Instruction on Damages

[4] Defendants assert the trial court erred in instructing the jury it could only award damages for lost profits through 30 June 2015. Defendants argue the lost profits between 30 June 2015 and the date of trial were not "purely speculative" but were based upon Borovsky's testimony as the owner of the business and substantial financial documents, which had been admitted into evidence.

"Damages for breach of contract may include loss of prospective profits where the loss is the natural and proximate result of the breach." *Mosley & Mosley Builders v. Landin Ltd.*, 87 N.C. App. 438, 446, 361 S.E.2d 608, 613 (1987) (citation omitted). "To recover lost profits, the claimant must prove such losses with reasonable certainty." *McNamara*, 121 N.C. App. at 407, 466 S.E.2d at 329 (citation and internal quotation marks omitted). Whether an amount has been proven with reasonable certainty is a question of law, to be reviewed *de novo*. *Plasma Ctr. of Am., LLC v. Talecris Plasma Resources, Inc.*, 222 N.C. App. 83, 91, 731 S.E.2d 837, 843 (2012).

Plaintiff argues Defendants' lost profits after vacating the location in Raleigh were speculative. Plaintiff asserts Defendants' profits were affected by the relocation of the jewelry business to a smaller market in Graham, North Carolina, and Defendants made little effort to find a new location within Raleigh. However, Defendants presented sufficient evidence of lost profits stemming from Plaintiff's breach of the lease. Defendants had an established history of profits, and used historical tax

records to establish profits before and after Plaintiff's breach. *Compare McNamara*, 121 N.C. App. at 409, 466 S.E.2d at 330.

The trial court did not give a limiting instruction preventing the jury from considering lost profits after Defendants vacated the premises, but after the ruling on the scope of the lost profits both parties' limited their closing arguments to damages through 30 June 2015. Because Defendants could prove their lost profits with reasonable certainty, the issue should have been before the jury. We remand for a new trial on the issue of potential lost profits damages. *See id.* at 412, 466 S.E.2d at 332.

V. Conclusion

A motion for JNOV should be "cautiously and sparingly granted." *Bryant*, 313 N.C. at 369, 329 S.E.2d at 338. As more than a scintilla of evidence supports Defendants' claim of constructive eviction, Plaintiff's JNOV should have been denied. The trial court properly denied the motion concerning Plaintiff's claims against Defendants. That portion of the order appealed from is affirmed.

We reverse the partial grant of Plaintiff's JNOV motion and reinstate the jury's verdict and the judgment entered thereon. We remand this issue to the trial court for a new trial on potential lost profits damages after 30 June 2015. We also remand to the trial court for a determination on the costs and fees, if any, Defendants are entitled to as the prevailing party. *It is so ordered.*

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges INMAN and BERGER concur.

COUNTY OF DURHAM, BY AND THROUGH DURHAM DSS, EX REL: SHARON L. WILSON AND TIFFANY A. KING, PLAINTIFF

v.

ROBERT BURNETTE, DEFENDANT

No. COA17-557

Filed 16 October 2018

Child Custody and Support—civil contempt—findings of fact—ability to pay

The trial court's findings of fact were too minimal to support its conclusion that defendant father's failure to pay child support was willful. The bare findings that he owned a boat, car, and cell phone; that he spent money on gas and food; and that he had medical issues but was not prevented from working did not sufficiently indicate the necessary evaluation of defendant's actual income, asset values, and reasonable subsistence needs to support a conclusion that defendant had the present ability to pay both his child support obligations and purge payments for civil contempt.

Judge TYSON concurring in part and dissenting in part.

Appeal by defendant from orders entered 23 November 2016 by Judge Fred Battaglia in District Court, Durham County. Heard in the Court of Appeals 18 October 2017.

Office of the County Attorney, by Senior Assistant County Attorney Geri Ruzage, for plaintiff-appellee.

Mary McCullers Reece, for defendant-appellant.

STROUD, Judge.

Trial courts have a responsibility to enforce the law and to order relief or punishment for willful disobedience of its orders. But courts are not just collection agencies. Trial courts also have a responsibility to consider the basic subsistence needs of an alleged contemnor before determining he has the ability to pay child support as ordered and the ability to pay purge payments. Although the exact details of basic subsistence needs will vary in different cases and the trial court has wide discretion in determining these needs, basic subsistence needs normally will include food, water, shelter, and clothing at the very least. The trial

court must make sufficient findings of fact to show that an alleged contemnor has the ability to pay his child support obligation and purge payment for civil contempt *after* considering his income, assets, and basic subsistence needs.

Defendant appeals two orders[1] entitled as "Order on Civil Contempt" based upon his failure to pay child support and past public assistance arrears from voluntary support agreements entered in 1993. Plaintiff presented no evidence other than the amount of child support arrears or past public assistance owed. Defendant presented substantial evidence of his inability to pay. Because the findings of fact in the orders do not support the trial court's determination that defendant willfully refused to pay or that he had the ability to pay the purge payments for civil contempt, and neither the evidence nor the findings of fact support the trial court's finding that defendant had the ability to satisfy the purge conditions, the trial court erred in holding him in civil contempt. We therefore vacate both orders and remand for entry of new orders.

I. Background

Defendant entered into a Voluntary Support Agreement and Order in File No. 93 CVD 4477 on 9 November 1993 for a child or children born to Tiffany King which required him to pay child support of $97.00 per month and to repay past public assistance of $5,600.00 at the rate of $13.00 per month.[2] We will refer to this case as the King matter. Defendant also entered into a Voluntary Support Agreement and Order in File No. 93 CVD 2822 on 19 November 1993 for his two children born to Sharon Wilson, which required him to pay child support of $203.00 per month starting 1 December 1993 and to repay past public assistance of $2,436.00, to be paid at the rate of $20.00 per month, for a total of $223.00 per month. We will refer to this case as the Wilson matter. Over the years, it appears that defendant's child support obligations in both the Wilson and King matters may have been modified and the amounts of past public assistance to be repaid increased, although he did pay some of his obligations.[3]

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1. On 31 May 2017, defendant filed a motion to amend and supplement the record on appeal, which was granted on 14 June 2017. The original record contains the Order on Civil Contempt entered on behalf of Sharon Wilson, while the supplement contains the Order on Civil Contempt entered on behalf of Tiffany King.

2. Our record does not include the entire Voluntary Support Agreement but does include these numbers which are not in dispute.

3. Defendant's entire payment history over the prior twenty-three years and modifications were not in our record, but those details are not necessary for the issues presented on appeal.

On 11 July 2016, plaintiff initiated contempt proceedings against defendant in both cases under N.C. Gen. Stat. § 50-13.9(d). In the Wilson matter, an order to show cause was issued based upon the most recent order of 26 May 2015, with total past due child support of $23,186.69 and $2,136.07 due based on the terms of the last order. In the King matter, an order to show cause was issued based upon the most recent order of 26 May 2015, with total past due child support of $9,138.73 due based on the terms of the last order. Both orders to show cause required defendant to appear on 2 September 2016 to show cause why he should not be held in contempt and to bring to the hearing "all records and information relating to your employment and the amount and source of your disposable income."

On 2 September 2016, defendant appeared in court and applied for a court-appointed attorney; the trial court entered an order continuing the hearing in the Wilson case to 29 September 2016 for "PRETRIAL" and to 18 October 2016 for "Hearing" and appointed counsel for defendant.[4] The case was then continued and the hearing began on 18 October 2016. After hearing a portion of defendant's testimony, the trial court *sua sponte* subpoenaed defendant's sister to testify and set the completion of the hearing for 15 November 2016. On 15 November 2016, the trial court initially questioned defendant's sister, and then defendant continued presenting his evidence.

The trial court held defendant in willful civil contempt for his failure to pay his child support. On or about 23 November 2016, the trial court entered a two-page "Order on Civil Contempt" in each case. The two orders are identical except for the case captions, file numbers and amounts of arrears stated in Finding No. 4 of each order; we quote Finding No. 4 below from both orders instead of repeating the rest of the order. The orders first find that defendant was in court and represented by counsel and the custodial parent was not in court. *All* of the remaining findings of fact are:

> 3. The Defendant has willfully failed and refused to comply with the Order of this Court entered on 2/1/2009.
>
> 4. The Defendant as of the date of his hearing is in arrears in the amount of $22,965.89. (Wilson case)

4. Our record does not include a similar order for the King case but based upon the later orders and hearing transcript it appears the two cases were heard simultaneously.

4. The Defendant as of the date of his hearing is in arrears in the amount of $8959.53. (King case)

5. The Defendant is presently able to comply with the Order or to take reasonable measures that would enable the Defendant to comply with the order and pay a purge of $2500.00 for the following reasons:

a. The Defendant owns a boat.

b. The Defendant owns a car.

c. The Defendant spends money on gas.

d. The Defendant spends money on food.

e. The Defendant has medical issues, but they do not prevent him from working.

f. The Defendant prepares and delivers food.

g. The Defendant repairs cars for money.

h. The Defendant pays car insurance in the amount of $147.00 per month.

i. The Defendant receives in kind income from his sister and friends.

j. The Defendant has a cell phone.

The trial court concluded defendant "should be found in direct Civil Contempt per NCGS § 5A, Article 2."[5] The trial court ordered that defendant be immediately taken into custody by the Durham County Sheriff and that he "shall remain in custody for 90 days or until a purge of $2,500.00 is paid into the office of the Clerk of Superior Court of this County." *In addition*, the trial court ordered: "The Defendant shall serve a 90 [day] sentence consecutive with any other child support contempt orders in this Court."[6] Defendant timely filed notice of appeal from both

5. North Carolina General Statutes Chapter 5A, Article 2 deals with Civil Contempt. Civil contempt is neither "direct" nor "indirect." *See generally* N.C. Gen. Stat. § 5A-21 (2017). North Carolina General Statutes Chapter 5A, Article 1 deals with Criminal Contempt, which may be either direct or indirect. *See* N.C. Gen. Stat. § 5A-13 (2017). The trial court specifically concluded defendant was in civil contempt based on Article 2.

6. Since two orders were entered on the same day with this same provision, defendant was effectively sentenced to a fixed term of imprisonment of 180 days.

orders. We will address both orders together since they are identical except for the case captions, file numbers, custodial parent, and findings of amount of arrearages.

II. Analysis

A. Standard of Review

> We review orders for contempt to determine if the findings of fact support the conclusions of law: The standard of review we follow in a contempt proceeding is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law. *Spears v. Spears*, __ N.C. App. __, __, 784 S.E.2d 485, 494 (2016) (citation and quotation marks omitted); *see also Watson v. Watson*, 187 N.C. App. 55, 64, 652 S.E.2d 310, 317 (2007) ("The standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law. Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment. North Carolina's appellate courts are deferential to the trial courts in reviewing their findings of fact." (Citations and quotation marks omitted)).

County of Durham v. Hodges, __ N.C. App. __, __, 809 S.E.2d 317, 323 (2018).

B. The absence of evidence is not evidence.

Defendant argues that the trial court failed to make sufficient findings of fact to support a conclusion of law that defendant was in willful contempt and challenges some findings as not supported by the evidence. Defendant contends neither the facts as found by the trial court nor the evidence show he could pay a $5,000.00 purge payment as ordered or that he could pay his monthly obligations.

Plaintiff begins its argument by stating that defendant "was working at the time of trial and therefore his medical issues may have . . . been restrictive but did not prevent him from working." Plaintiff does not direct us to any evidence which would indicate that defendant was "working" at the time of trial, and the trial court's order did not make a finding he was "working." Plaintiff does not directly respond to

defendant's arguments but simply emphasizes that the trial court is the sole judge of the credibility of the evidence and the trial court apparently did not find defendant's evidence of his medical disability to be credible.

This case is remarkably similar, both factually and legally, to *Hodges*, which discussed the burden of proof for civil contempt and the required findings of fact:

> Proceedings for civil contempt can be initiated in three different ways: (1) by the order of a judicial official directing the alleged contemnor to appear at a specified reasonable time and show cause why he should not be held in civil contempt; (2) by the notice of a judicial official that the alleged contemnor will be held in contempt unless he appears at a specified reasonable time and shows cause why he should not be held in contempt; or (3) by motion of an aggrieved party giving notice to the alleged contemnor to appear before the court for a hearing on whether the alleged contemnor should be held in civil contempt. Under the first two methods for initiating a show cause proceeding, the burden of proof is on the alleged contemnor. However, when an aggrieved party rather than a judicial official initiates a proceeding for civil contempt, the burden of proof is on the aggrieved party, because there has not been a judicial finding of probable cause.
>
> In the present case, the trial court entered an order to show cause, which shifted the burden of proof to defendant to show cause as to why he should not be held in contempt of court. The party alleged to be delinquent has the burden of proving either that he lacked the means to pay or that his failure to pay was not willful.
>
> And despite the fact that the burden to show cause shifts to the defendant, our case law indicates that the trial court cannot hold a defendant in contempt unless the court first has sufficient evidence to support a factual finding that the defendant had the ability to pay, in addition to all other required findings to support contempt.

Hodges, __ N.C. App. at __, 809 S.E.2d at 324 (citations and quotation marks omitted).

Because of the order to show cause, defendant had the burden of production of evidence to show he was unable to pay his child support

as ordered. *Id.* at __, 809 S.E.2d at 324. Defendant presented substantial evidence regarding his medical condition, his minimal living expenses, and his lack of income. Plaintiff presented no evidence other than the amount of arrears owed, including any evidence regarding defendant's ability to work, income, potential income, or assets. "[D]espite the fact that the burden to show cause shifts to the defendant, our case law indicates that the trial court cannot hold a defendant in contempt unless the court first has sufficient evidence to support a factual finding that the defendant had the ability to pay, in addition to all other required findings to support contempt." *Id.* at __, 809 S.E.2d at 324.

Plaintiff is correct that the trial court is the sole judge of credibility and weight of the evidence, and although the trial court could find defendant's evidence not to be credible, this does not *create* evidence for plaintiff. The absence of evidence is not evidence. Defendant presented evidence, and even if the trial court determined not one word of it to be true, we are then left with no evidence from plaintiff other than the amount owed. Just as in *Hodges*, "defendant met his burden to show cause as to why he should not be held in contempt, presenting evidence from [a] treating physician[ ] that he is physically incapable of gainful employment. DSS presented no evidence and did not refute defendant's evidence at all." *Id.* at __, 809 S.E.2d at 324. But even based upon Defendant's evidence, it may be possible for the trial court to have determined that Defendant had the ability to pay more than he actually paid.

Defendant need not have the ability to pay his entire support obligation to be held in civil contempt for failure to pay. If he had the ability to pay some of his obligation, but he paid none, or less than he could have paid, he may still be held in contempt. We addressed this type of situation in *Spears*:

> We agree with plaintiff that an interpretation of the cases which would always require a finding of full ability to pay would "encourage parties to completely shirk their court-ordered obligations if they lack the ability to fully comply with them." Yet the cases do not go quite so far as plaintiff suggests. An obligor may be held in contempt for failure to pay less than he could have paid, even if not the entire obligation, but the trial court must find that he has the ability to fully comply with any purge conditions imposed upon him.
>
> The seminal case on this issue from our Supreme Court is *Green v. Green*, a civil contempt proceeding for

nonpayment of alimony, in which the Court held that the trial court's findings of fact were insufficient to support its order that the defendant be imprisoned until he paid the amounts owed in full:

> The judge who heard the proceedings in contempt recited the findings of fact made by the judge who granted the order allowing alimony, and added two others, in words as follows: "I further find that said defendant could have paid at least a portion of said money, as provided in said order, and that he has willfully and contemptuously failed to do so. I further find that he is a healthy and able-bodied man for his age, being now about fifty-nine years old." So, notwithstanding the finding of the fact that the defendant was able to pay only a part of the amount ordered to be paid, he was to be committed to the common jail until he should comply with the order making the allowance in the nature of alimony, that is, until he should pay the whole amount. Clearly, the judgment can not be supported on that finding of fact.

Green v. Green, 130 N.C. 578, 578–79, 41 S.E. 784, 785 (1902).

Although the Court in *Green* did not state this explicitly, it seems that the defendant paid nothing toward his alimony obligation and that the trial court found that he could have paid "at least a portion" of the amounts owed. *Id.*, 41 S.E. at 785. Indeed, this sort of vague finding that an obligor could have paid "more" could be made in almost any case where the obligor has paid nothing at all, since most obligors probably have the ability to pay $1.00 per month, for example. Presumably, the defendant in *Green* had the ability to pay some significant amount but less than the full amount. The problem with the trial court's order in *Green* was that it went too far with the remedy --despite a finding that the defendant had the ability to pay only a portion of the sums owed, he was imprisoned "until he should pay the whole amount." *Id.* at 579, 41 S.E. at 785. In addition, we can also infer from this opinion that the only source of the defendant's funds was his labor and that he was "healthy and able-bodied[,]" thus able to work to earn funds to pay the plaintiff, although he could not work while in jail. *Id.* at 578-79, 41 S.E. at 785. He apparently did not have investments or other sources of funds

> upon which to draw. *See id.*, 41 S.E. at 785. Based upon the trial court's findings, the order showed that the defendant had the ability to earn enough income to pay only part of his alimony before he went to jail; while in jail, he would have no ability to pay anything although he was ordered to pay in full. *Id.*, 41 S.E. at 785. For these reasons, the Court found error. *Id.*, 41 S.E. at 785.
>
> *Green* has been followed for over 100 years in both alimony cases and child support cases. These cases are all very fact-specific.

Spears, 245 N.C. App. at 278-80, 784 S.E.2d at 497-98 (citations omitted). We will therefore review the order to determine if the evidence supports the challenged findings of fact and if the findings support the trial court's conclusions of law.

C. Taking the inventory of financial condition

In determining the ability to pay and willfulness of failure to pay child support, the trial court must consider both sides of the equation: income or assets available to pay *and* reasonable subsistence needs of the defendant. *See*, *e.g.*, *Bennett v. Bennett*, 21 N.C. App. 390, 394, 204 S.E.2d 554, 556 (1974) ("Our Supreme Court has indicated . . . that the court below should take an inventory of the property of the plaintiff; find what are his assets and liabilities and his ability to pay and work -- an inventory of his financial condition -- so that there will be convincing evidence that the failure to pay is deliberate and willful." (Citations and quotation marks omitted)).

Defendant argues that the trial court did not make a "meaningful analysis of [his] income and expenses" in its findings of fact. Defendant contends some findings are not supported by the evidence and others "provided little or no information from which the court could deduce that [defendant] was able to pay more" toward his child support arrears.

> The trial court need not find detailed evidentiary facts but an order must have sufficient findings to support its conclusions of law and decretal. There are two kinds of facts: Ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts. While a trial court need not make findings as to all of the evidence, it must make the required ultimate findings, and there must be evidence to support such findings.

Hodges, __ N.C. App. at __, 809 S.E.2d at 323 (citations and quotation marks omitted). We will therefore address defendant's arguments about each of the trial court's findings of fact enumerated as its specific reasons for determining defendant had the ability to pay or to take reasonable measures to enable him to pay.

i. "The Defendant owns a boat."

Defendant does not challenge this finding as unsupported by the evidence. He did own a boat. The trial court made no findings of the type, size, age, value, or condition of the boat. Based on the evidence before the court, defendant received the boat as a gift from a friend and it could be worth as much as $1,500.00. Defendant agreed he would sell the boat. "Reasonable measures" to pay an outstanding judgment could include "borrowing the money, selling defendant's . . . property . . ., or liquidating other assets, in order to pay the arrearage." *Teachey v. Teachey*, 46 N.C. App. 332, 335, 264 S.E.2d 786, 787-88 (1980). Selling the boat is a reasonable measure which would enable defendant to pay a portion of the purge payments, or defendant could have sold the boat and used the proceeds to pay some of his outstanding obligation. At most, the finding and the evidence could show defendant's ability to pay the proceeds from the sale of the boat.

ii. "The Defendant owns a car."

Defendant does not challenge this finding as unsupported by the evidence. He did own a car. The trial court made no findings of the make, model, age, condition, or value of the car. Based on the evidence before the court, it was a gift to defendant from a friend and could be worth as much as $1,800.00. Defendant could sell the car, although as defendant contends, then he would not have transportation to go to his medical appointments or therapy, nor would he have transportation to get to a workplace, if his medical restrictions are lifted. At most, this finding and the evidence could show defendant's ability to pay the proceeds from the sale of the car.

iii. "The Defendant spends money on gas."

Defendant does not challenge this finding as unsupported by the evidence. He did buy a little gas. The trial court made no findings about how much gas defendant actually bought or where he got the money for it. Although the trial court need not make findings on each evidentiary fact, this finding -- like the others -- is too minimal to be meaningful. The evidence before the court was that defendant did not drive very much due to the effects of his medication. When asked how he paid for gas, he

testified that he had "a little bitty thing with change in it." He collected "pennies, nickels, dimes, quarters" to pay for gas. He would go to friends occasionally to get "a little $20 here, $30 there." This finding does not show defendant has any financial ability to pay his monthly obligation or purge payments but only that he has a minimal living expense to put gas in his car.

iv. "The Defendant spends money on food."

Defendant does not challenge this finding as unsupported by the evidence. The trial court made no findings about how much defendant spends on food. The evidence before the court showed that defendant often relied on his sister or friends to help with basic subsistence needs such as food.[7] This finding does not show that defendant has any financial ability to pay his support obligation but only that he has a minimal living expense to buy food.

v. "The Defendant has medical issues, but they do not prevent him from working."

First, even if this finding were supported by the evidence, it would not support a determination of ability to pay and willful contempt. The finding does not say what sort of work the defendant could do or how much that work may pay and there was no evidence to support findings of these facts. In this sense, this finding about "work" generally is similar to the findings in prior cases in which far more detailed findings were held to be insufficient:

> The only findings of fact relating to plaintiff's ability to pay include:
>
> 14. The Plaintiff is an able-bodied, 32 year old, who attended high school up to the tenth grade. He has no military background. His work experience includes running a Tenon machine in the furniture industry. The plaintiff has skills in the furniture industry, but prefers to work in landscaping or construction. The Plaintiff has worked odd-jobs for himself and for others. The Plaintiff has been paid in cash. The Plaintiff worked for 8 months last year as a brick mason for Jones Rock Mason, and earned $8.00 per hour and worked forty-hour weeks, with no overtime.
>
> . . . .

7. We take judicial notice that people must have some food to eat or they will starve to death, and they usually have to buy this food.

> 16. The Court finds that the Plaintiff is like an ostrich, burying his head in the sand, in [that] he believes that if he does not see the minor child's medical bills, that he will not have to pay them. The Plaintiff believes ignorance is bliss.
>
> . . . .
>
> 18. While [the] Court does not disbelieve that the Plaintiff would prefer to work at an outside job, when a child is in the equation, the Plaintiff has to do what is necessary for the child.

Clark v. Gragg, 171 N.C. App. 120, 124, 614 S.E.2d 356, 359 (2005). These findings addressed the defendant's work experience, physical ability to work, and some actual work he had done and his hourly pay, but this Court reversed the order, remanded "for further findings of fact" and instructed the trial court to "make specific findings addressing the willfulness of plaintiff's non-compliance with the prior consent orders, including findings regarding plaintiff's ability to pay the amounts provided under those prior orders during the period that he was in default." *Id.* at 126, 614 S.E.2d at 360.

We also noted in *Clark* that prior cases held similar findings to be insufficient to show ability to pay and willfulness:

> Our appellate courts have previously held that almost identical findings are insufficient, standing alone, to support the finding of willfulness necessary to hold a party in civil contempt.
>
> In *Mauney*, 268 N.C. at 257-58, 150 S.E.2d at 394, our Supreme Court held that the following finding of fact was not a sufficient basis for the conclusion that the non-paying party's conduct was willful in the absence of a finding that defendant had in fact been able to make the required payments during the period in which he was in arrearage:
>
> Judge Martin found that the defendant "is a healthy, able bodied man, 55 years old, presently employed in the leasing of golf carts and has been so employed for many months; that he owns and is the operator of a Thunderbird automobile; that he has not been in ill health or incapacitated since the date of [the] order [requiring payment of alimony] entered on the 5th day of October, 1964; that the defendant has the ability to earn good wages in that he

> is a trained and able salesman, and is experienced in the restaurant business; and has been continuously employed since the 5th day of October, 1964; that since October 5, 1964, the defendant has not made any motion to modify or reduce the support payments." *Id.* at 255, 150 S.E.2d at 392. Likewise, in *Hodges v. Hodges*, 64 N.C. App. 550, 553, 307 S.E.2d 575, 577 (1983), this Court reversed an order for civil contempt because [o]ur Supreme Court has held that a trial court's findings that a defendant was healthy and able-bodied, had been and was presently employed, had not been in ill-health or incapacitated, and had the ability to earn good wages, without finding that defendant presently had the means to comply, do not support confinement in jail for contempt. *Id. See also Yow v. Yow*, 243 N.C. 79, 84, 89 S.E.2d 867, 871-72 (1955) (setting aside civil contempt decree when the trial court found only that the defendant was employed as a manager of a grocery and did not specifically find that the defendant possessed the means to comply with the prior orders during the period that he was in default).

Clark, 171 N.C. App. at 124-26, 614 S.E.2d at 359-60.

But defendant also challenges this finding of his ability to work as unsupported by the evidence. The only evidence before the court regarding defendant's medical condition was his testimony, his sister's testimony, and the letter from defendant's physician. The evidence showed that defendant was injured when he fell from a roof while doing roofing work in 2013. Defendant testified that he had fallen "14 feet onto a brick foundation" and "that messed me up pretty bad." He kept trying to work after the accident but in the "last three, four years" the doctor "said no more working." He testified that since the accident, he had been in pain and had to take "strong medication" which "knocks me out" so he could not work while taking it. Without objection from plaintiff, defendant entered into evidence a letter from Dr. Amir Barzin, Director of Family Medicine Inpatient Service at UNC Healthcare. Dr. Barzin wrote that he had been defendant's primary care physician since October 2013. Dr. Barzin stated that he had been working with defendant to try to "control issues that have been related to pain and injury" and that he was on work restrictions. Defendant was being seen in UNC Healthcare's "Physical Medicine and Rehabilitation Department" as well. Dr. Barzin reevaluated his work restrictions at each visit and noted that "when he is able to work with limited pain the restriction will be lifted." Defendant

also testified about a burn injury to his right arm and his back "from half way down to my lower back." Defendant is right-handed. He received second and third degree burns in a grease fire in 2003 and his "forearm swells up."

Considering all of the findings of fact and the transcript of the trial, including the trial court's comments, it appears that this finding meant that defendant had the ability to "work" only in the sense he was physically able to do some household tasks such as laundry or cooking. For purposes of ability to pay child support, the ability to "work" means more than the ability to perform some personal household tasks; it means the present ability to maintain a wage-paying job. S*ee generally Self v. Self*, 55 N.C. App. 651, 653-54, 286 S.E.2d 579, 581 (1982) ("While the evidence establishes that defendant was physically able to work, it does not establish that work was available to him. . . . Absent evidence refuting testimony that failure to pay as ordered was due to lack of financial means, the record does not support a finding that the failure was willful."). A defendant need not be completely incapacitated to be considered as unable to "work." *See*, *e.g.*, *Brandt v. Brandt*, 92 N.C. App. 438, 444, 374 S.E.2d 663, 666 (1988) ("The trial court considered this evidence and concluded that the plaintiff's medical condition prevented her from undertaking any meaningful employment and that she is unable to work and earn income to defray her own expenses. This conclusion is supported by the testimony of the plaintiff."), *aff'd per curiam*, 325 N.C. 429, 383 S.E.2d 656 (1989).

In addition, the trial court's comments indicate some potential misapprehension of the law regarding the relevant time for defendant's ability to work. The defendant must be *currently* able to comply with the order to be held in civil contempt, *see*, *e.g.*, *Teachey*, 46 N.C. App. at 334, 264 S.E.2d at 787 ("For civil contempt to be applicable, the defendant must be able to comply with the order or take reasonable measures that would enable him to comply with the order. We hold this means he must have the present ability to comply, or the present ability to take reasonable measures that would enable him to comply, with the order."); a defendant may be held in criminal contempt as punishment for an act committed *in the past*, when he had the ability to comply, even if he no longer has the ability, but *not* civil contempt. *See*, *e.g.*, *O'Briant v. O'Briant*, 313 N.C. 432, 434, 329 S.E.2d 370, 372 (1985) ("A major factor in determining whether contempt is civil or criminal is the purpose for which the power is exercised. When the punishment is to preserve the court's authority and to punish disobedience of its orders, it is criminal contempt. Where the purpose is to provide a remedy for an injured

suitor and to coerce compliance with an order, the contempt is civil."). A person cannot be held in both civil and criminal contempt for the same conduct. *See* N.C. Gen. Stat. § 5A-21(c). This is a crucial distinction.[8]

> Civil contempt and criminal contempt are distinguishable. It is essential to the due administration of justice in this field of the law that the fundamental distinction between a proceeding for contempt under G.S. 5-1 and a proceeding as for contempt under G.S. 5-8 be recognized and enforced. The importance of the distinction lies in differences in the procedure, the punishment, and the right of review established by law for the two proceedings.
>
> . . . Criminal contempt is a term applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. Civil contempt is a term applied where the proceeding is had to preserve and enforce the rights of private parties to suits and to compel obedience to orders and decrees made for the benefit of such parties. Resort to this proceeding is common to enforce orders in the equity jurisdiction of the court, orders for the payment of alimony, and in like matters.

Mauney v. Mauney, 268 N.C. 254, 256, 150 S.E.2d 391, 393 (1966) (citations, quotation marks, and ellipses omitted).

When defendant was testifying about his medical condition, the trial court noted that defendant had previously been held in contempt in 2015 – after his 2013 fall from a roof – so he must have had the ability to work in 2015[9]:

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8. These comments are not the only reason we note the distinction between civil and criminal contempt. The orders both found defendant in "direct civil contempt" and imposed fixed term of imprisonment of 90 days for each case, to be served consecutively, for a total of 180 days imprisonment. A fixed term of imprisonment is a proper sanction for *criminal contempt*, but not for civil contempt. *See* N.C. Gen. Stat. § 5A-22(a) (2017) ("A person imprisoned for civil contempt must be released when his civil contempt no longer continues."). This fixed term of imprisonment was *in addition* to civil contempt imprisonment which defendant could purge by paying $2,500.00 for each order. In other words, defendant would remain in jail for at least 180 days (a criminal contempt sanction) even if he immediately paid the $5,000.00 in purge payments (a civil contempt sanction). "A person who is found in civil contempt under this Article shall not, for the same conduct, be found in criminal contempt under Article 1 of this Chapter." N.C. Gen. Stat. § 5A-21(c).

9. The "Commitment Order for Civil Contempt- Child Support," on Form AOC-CV-603, Rev. 3/03, from 26 May 2015 is in our record on appeal. None of the boxes on the form are checked and it has no findings of fact or conclusions of law. It simply orders defendant's

> THE COURT: Well, ma'am, in 2015, he was held in contempt and had the ability to make the payments, so I guess why are we going back and revisiting that issue, since I don't have any medical -- there's no medical issue that he -- that's preventing him from working, and that seems to me he was found in willful contempt in March -- on May the 26th, 2015, by this Court. So if you could help me to understand why we're re-addressing that issue.
>
> MS. WATKINS: Well, yes, Your Honor. I'm not sure it was entered into evidence at that time, however the injury continues and continues to prevent him from working.

Even if defendant was physically able to work at a wage-paying job in 2015, his former ability to work would not mean he was still able to work at the time of the hearing. Dr. Barzin's letter was dated 10 October 2016. Dr. Barzin did not say when defendant's work restrictions began but did say that he currently could not work.

Because the trial court determines the credibility and weight of the evidence, it is possible the trial court may be able to make more specific findings regarding defendant's actual ability to work as of the date of the hearing and earnings from his work, so we must remand for additional findings as discussed by *Clark*, 171 N.C. App. at 126, 614 S.E.2d at 360.

vi. "The Defendant prepares and delivers food."

Defendant challenges this finding as unsupported by the evidence. It is not clear what this finding means; certainly defendant did not operate a catering business. The entirety of evidence about defendant's preparation and delivery of food was defendant's sister's testimony in response to the trial court's question, "What can you tell me about him?"

> Well, he's a good person, he's a kind-hearted person. He'll do anything for anybody. In fact, I visit nursing homes, facilities, homes. I'm at work and I'll call him ask him if he'd fix food for me, at times, to take it to nursing homes to different people, people that we know, people we do not know. He's always been there when there are funerals or anything, I can call on him and he'll cook for me.

There was not a scintilla of evidence that defendant was ever paid for any food nor any evidence he ever worked in any sort of food service

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imprisonment for civil contempt and sets a purge payment. It is nearly identical to the order entered in *Hodges*, __ N.C. App. at __, 809 S.E.2d at 320.

employment. Generally, people do not charge a fee for food they have prepared for a family member or to take to someone in a nursing home or to a funeral. Again, this finding does not demonstrate defendant's ability to work at a wage-paying job or his ability to pay child support or the purge payments.

vii. "The Defendant repairs cars for money."

Defendant challenges this finding as unsupported by the evidence. Defendant is correct there was no evidence he earned income from car repairs. The entire evidence which could relate to car repair was his sister's following testimony:

> Q. Do you know whether or not he sells vehicles like junk cars?
>
> A. He put -- He fix [sic] cars, and there are times I helped him. There are times, yes.

As defendant notes, the meaning of "fix" in this quote is uncertain, since there was no evidence he *repaired* cars. The only evidence was that he sold junk cars. Junk cars are, by definition, beyond repair. Defendant had earlier testified that some friends had given him some junk cars which he then sold to generate funds to pay toward his child support obligations. He testified:

> A. I'm just messing around with, you know, friends of mine that had cars and I will get those and sell them to the junk man. But about three or four months ago I did -- every little money I had I was sending it in. It was like maybe $30, but I sent it to Raleigh, and that's what they told me last time for the last three or four months to sent one [sic] to Raleigh.
>
> Q. And how much are you getting when you're selling these junk cars?
>
> A: I don't get like maybe $100, $120 or whatever I get.
>
> Q. And how many have you sold in October?
>
> A. I think it was like two, three something like that.
>
> Q. So you received about two to three hundred dollars this month.
>
> A. Yeah. And the money that I had I had to have the receipts for it, and I did send that in, the money order to Raleigh.

To the extent that the trial court may have meant this finding to address the type of "work" defendant may have the ability to perform, it is not sufficient to show that he had the ability to pay. Whether defendant repaired a car or just sold a junk car, the trial court's finding does not indicate that defendant was paid, or could be paid, for anything he did to a car. This finding does not show that defendant had the ability to pay his monthly obligations or purge payments.

viii. "The Defendant pays car insurance in the amount of $147.00 per month."

Defendant challenges this finding as unsupported by the evidence because by the time of the second hearing date, defendant had cancelled his car insurance. But even if the trial court did not find defendant's testimony he cancelled his insurance to be credible, this finding indicates only that defendant had a basic living expense required by law for him to continue to operate his car.

ix. "The Defendant receives in kind income from his sister and friends."

Defendant challenges this finding as unsupported by the evidence but acknowledges there was evidence that defendant's sister and friends had assisted defendant with paying essential bills such as utilities. But as defendant notes, there is no finding of the "circumstances, regularity, and the amount of 'in kind' income" and "no context for determining whether those contributions enabled [defendant] to eke [sic] out anything beyond his essential living expenses." Defendant's characterization of the finding is accurate. The evidence showed only that some friends had assisted defendant by giving him something, such as the junk cars to sell or the boat or his car, and that his sister assisted him at times with paying bills in varying amounts.

This Court has discussed the type of financial support from others which may be "in kind" income for purposes of establishing child support, *see generally Spicer v. Spicer*, 168 N.C. App. 283, 288-89, 607 S.E.2d 678, 682-83 (2005), so this analysis is helpful for determining ability to pay child support for purposes of contempt as well. Generally, evidence must show the amount of the support and that it is given on a regular basis:

> The Guidelines include as "income" any "maintenance received from persons other than the parties to the instant action." Guidelines, 2005 Ann. R. N.C. 48. "Maintenance" is defined as "[f]inancial support given by one person to

> another. . . ." Black's Law Dictionary 973 (8th ed.2004). As our appellate courts have previously recognized, cost-free housing is a form of financial support that may be considered in determining the proper amount of child support to be paid. *See Guilford County ex rel. Easter v. Easter*, 344 N.C. 166, 171, 473 S.E.2d 6, 9 (1996) (voluntary support by maternal grandparents, including cost-free housing, properly considered in determining child support); *Gibson v. Gibson*, 24 N.C. App. 520, 522-23, 211 S.E.2d 522, 524 (1975) (evidence that employer supplied father with automobile and rent-free apartment that reduced his living expenses was evidence of "additional income" from his job beyond his salary). *See also* 2 Suzanne Reynolds, *Lee's North Carolina Family Law* § 10.8 at 533 (5th ed. 1999) (included in income are "in-kind payments, such as a company car, free housing or reimbursed meals, if they are significant and reduce personal living expenses"). We therefore hold that the trial court did not err in including the $300.00 per month value of Mr. Spicer's housing as income.

Spicer, 168 N.C. App. at 288-89, 607 S.E.2d at 682-83.

None of the evidence here shows a regular or consistent amount or type of assistance defendant has received from others and thus it cannot support a finding of his ability to pay his ongoing obligation or purge payments.

x. "The Defendant has a cell phone."

The defendant does not challenge this finding as unsupported by the evidence. Once again, there is no finding of the cost of the cell phone, although the evidence showed that defendant's monthly bill was $42.00. Having a cell phone does not show defendant's ability to pay but instead is a basic living expense. Defendant notes this finding illustrates the "trial court's dogma that any living expense [defendant] paid reflected a dereliction of his duty to pay off his child support." Just as with the findings that defendant pays for gas, food, and car insurance, this finding shows only that defendant has a living expense but does not indicate an ability to pay.

D. Failure to consider living expenses

The central deficiency of the trial court's order is the complete failure to consider defendant's living expenses. This is apparent even

if we treated all of the findings as correct. The trial court made no finding regarding the value of the defendant's car or boat but required him to sell these items. Defendant acknowledged he should sell the boat, but without a car (with liability insurance required by law) and some gas, defendant would have no transportation to get to doctor appointments or to work, should he ever be released from his medical work restrictions.

To determine the ability to pay, the trial court must "take an inventory of the property of the [defendant]; find what are his assets and liabilities and his ability to pay and work -- an inventory of his financial condition -- so that there will be convincing evidence that the failure to pay is deliberate and willful." *Bennett*, 21 N.C. App. at 394, 204 S.E.2d at 556 (citations and quotation marks omitted). Only then can the trial court determine if the defendant's failure to pay is willful. *Id.* Based upon the evidence, the trial court must do an inventory considering defendant's income, or ability to earn, if the trial court makes the required finding of fact to impute income to defendant. *See*, *e.g.*, *Lasecki v. Lasecki*, 246 N.C. App. 518, 523, 786 S.E.2d 286, 291 (2016) ("The trial court may impute income to a party only upon finding that the party has deliberately depressed his income or deliberately acted in disregard of his obligation to provide support[.]" (Citation and quotation marks omitted)).

Our dissenting colleague takes the position that the expense side of the financial inventory of a parent under obligation to pay child support can include *only* food, water, clothing, and shelter as legitimate needs for subsistence, and all expenses beyond this are unnecessary and unreasonable. This position is not supported by prior precedent or the practical needs of a parent to allow the parent to have the ability to work and support the child. The financial inventory must consider both sides of the equation: the defendant's income, assets, or ability to take reasonable means to obtain funds to pay support *minus* the defendant's legitimate reasonable needs and expenses.[10] The defendant has the ability to pay only to the extent that he has funds or assets remaining after those expenses.

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10. The trial court did not find that defendant was malingering, spending excessively, acting in bad faith, suppressing his income, or hiding assets, and the trial court did not impute income to defendant. *See Ellis v. Ellis*, 126 N.C. App. 362, 364, 485 S.E.2d 82, 83 (1997) ("It is clear, however, that before the earnings capacity rule is imposed, it must be shown that the party's actions which reduced his income were not taken in good faith." (quotations, brackets, and citation omitted)).

The trial court has broad discretion to determine which expenses are reasonable and necessary, but depending upon the facts of the particular case, those expenses may include more than the basic subsistence needs of food, clothing, water, and shelter. The extent of the legitimate needs of the obligor is in the discretion of the trial court because in some cases, it would be to the child's detriment to ignore the obligor's needs beyond food, water, clothing, and shelter. For example, an obligor who lives and works in an urban area with reliable public transportation may not need a car to get to work, to get to medical appointments, or to visit with or transport a child – although he would still need funds to pay for the public transportation. But an obligor who lives in an area without public transportation and has a job which requires transportation normally must have a car or he will be unable to work. If he loses his job, he will not be able to pay child support. Owning and operating a car requires certain expenses, including liability insurance, gas, and maintenance such as oil changes and new tires. This is why the trial judge has the discretion to determine if an obligor *needs* a car and the reasonable expenses for the car.

This opinion does *not* hold that liability insurance, gas, or a cell phone are necessities for anyone, including defendant. But it is apparent from the trial court's order that it considered all of these items, along with food, as disposable assets instead of living expenses. The trial court did not consider defendant's legitimate need for anything – even food, water, clothing, or shelter. On remand, the trial court may determine that defendant has no legitimate need for a means of transportation or communication, but the trial court must at least consider the possibility that these expenses might be reasonable needs.

Here, the evidence presented does not support a finding that defendant had the ability to pay the purge payments ordered by the trial court. Defendant's assets were a car, worth at most $1,800.00, and a boat, worth roughly $1,500.00. The total value is $3,300.00. If defendant sold both of his assets for his estimated value, he would still not have sufficient funds to pay the $5,000.00 purge. The trial court must consider defendant's financial condition, including reasonable expenses for subsistence, as part of the determination of his ability to pay his regular obligation as well as purge conditions. The trial court's findings do not address how much income defendant has, if any, or how much his subsistence expenses are. There was some evidence that defendant had received some money from selling a few junk cars which were given to him. He testified he made about $200.00 to $300.00 one month, but the trial court must be able to make findings which demonstrate his ability

both to subsist and to pay his obligations, or some portion of the obligations if not the entire amount. The trial court must also make findings of how much defendant has actually paid, as there was evidence that he had made some payments, and compare this to the amount he had the ability to pay. The order does not address defendant's payments at all.

We also recognize there were two orders entered, and that the purge payment in each order was $2,500.00. If defendant sold the car *and* the boat, he would have enough to pay *one* purge payment. But the two orders were entered on the same date as a result of the same hearing, both require the same purge payment, and the term of imprisonment in each was consecutive to any other order. Practically speaking, this means defendant would have to pay $5,000.00 to purge his contempt for both orders. The trial court could not logically find that defendant was able to pay the purge payment in *both* orders, even if it could have found him able to pay in one of the orders. After selling both the car and the boat and paying one purge payment, defendant would have only a portion of the purge payment for the other order. Yet a finding of ability to pay *some* portion of the purge payment is not sufficient. Even if the defendant owns some property or has some income, the actual value of that property or the amount of income must be sufficient to satisfy the purge conditions. *See Jones v. Jones*, 62 N.C. App. 748, 749, 303 S.E.2d 583, 584 (1983) ("While the evidence tends to show that defendant was gainfully employed as a construction worker at an hourly wage of $5.75 and that he lives with his second wife who also is gainfully employed with an average take-home pay of approximately $406.00 per month and that the defendant and his wife reside in a trailer situated on some 'land' given to defendant by his present father-in-law and that the trailer is heavily mortgaged and that monthly mortgage payments are $250.00 and that the mortgage will be paid in six years and that defendant owns an automobile which is 'broken,' there is no evidence in this record that defendant actually possesses $6,540.00 or that he has the present ability to take reasonable measures that would enable him to comply, with the order. " (Citation and quotation marks omitted)).

III. Conclusion

Because the existing evidence does not support the findings of fact, and the findings of fact do not support the trial court's conclusions that defendant had the ability to pay either his ongoing obligations or his purge payments in the Wilson and King cases, we vacate both orders. We remand for entry of new orders including the required findings of fact, including but not limited to the defendant's reasonable living expenses, and conclusions of law for contempt *and* his present ability to pay the

full amount of any purge payments ordered. The trial court may, in its discretion, receive evidence on remand.[11]

VACATED and REMANDED.

Judge HUNTER concurs.

Judge TYSON concurs in part and dissents in part.

TYSON, Judge, concurring in part and dissenting in part.

The majority's opinion vacates and remands the trial court's orders. It asserts no competent evidence in the record supports the trial court's unchallenged findings and conclusion that Defendant failed to meet his burden to show cause and he could have paid at least some portion of his child support obligations, or that he can meet his purge conditions. If so, we should remand for further findings of fact solely on Defendant's present ability to purge.

I concur in part to remand for further findings on Defendant's present ability to purge his contempt, but respectfully dissent in part. Defendant has not met his burden or shown any cause why he should not be held in willful contempt to vacate the trial court's order. Competent evidence in the record presented by the Defendant himself supports the trial court's unchallenged findings of fact that Defendant repeatedly failed to pay his child support. Defendant does not deny he failed to pay child support for his children and his own evidence shows he possessed funds and hoarded assets above his basic necessities. Defendant's actions prove he was willing to and did deprive his children of their most basic needs, rather than discharge his lawful, voluntarily agreed-upon, and minimal child support obligations when he clearly had some means to do so.

I. Duty to Support

There is an ancient expectation and duty required of parents to support their children. *State v. Bell*, 184 N.C. 701, 713, 115 S.E. 190, 196 (1922). "This duty is recognized and discharged even by the higher orders of the animal world, and it would seem to be prescribed as to the human father by the most elementary principles of civilization as well as

11. On remand, if the trial court holds defendant in civil contempt, new evidence will be necessary to determine if defendant has the *present* ability to pay any purge payments ordered.

of law." *Id.* (Emphasis omitted.) The Supreme Court of North Carolina has also held: "A duty to support and maintain minor children is universally recognized as resting upon the parents of such children . . . . This parental duty is said to be a principle of natural law[.]" *Wells v. Wells*, 227 N.C. 614, 618, 44 S.E.2d 31, 34 (1947).

The parents' failure to provide support for their child creates both civil and criminal liability for the parents. *See* N.C. Gen. Stat. § 49-2 (2017) ("Any parent who willfully neglects or who refuses to provide adequate support and maintain his or her child born out of wedlock shall be guilty of a Class 2 misdemeanor."); *see also* N.C. Gen. Stat. § 49-15 (2017) ("Upon and after the establishment of paternity pursuant to G.S. 49-14 of a child born out of wedlock, the rights, duties, and obligations of the mother and the father so established, with regard to support and custody of the child, shall be the same, and may be determined and enforced in the same manner, as if the child were the legitimate child of the father and mother.").

The case before us involves civil contempt. Under N.C. Gen. Stat. § 50-13.4(c1) (2017), North Carolina's stated public policy and "purpose of the [support] guidelines and criteria shall be to ensure that payments ordered for the support of a minor child are in such amount as to meet the reasonable needs of the child for health, education, and maintenance[.]" Parents must meet the support needs of their children after their own "basic necessities," food, clothing and shelter, are met. Once these minimal or "basic necessities" for the parents' self-subsistence are satisfied, all other funds and assets of the parents are priority to and must be used to support their children, under pain of contempt. *See Bell*, 184 N.C. at 713, 115 S.E. at 196.

II. Contempt

"An order for the periodic payments of child support or a child support judgment that provides for periodic payments is enforceable by proceedings for civil contempt." N.C. Gen. Stat. § 50-13.4(f)(9) (2017). Once Defendant failed to make his child support payments, proceedings for civil contempt are properly initiated "by the order of a judicial official directing the alleged contemnor to appear at a specified reasonable time and show cause why he should not be held in civil contempt[.]" *Moss v. Moss*, 222 N.C. App. 75, 77, 730 S.E.2d 203, 204-05 (2012). Once the order directs the "alleged contemnor to appear," Defendant has the burden to "show cause why he should not be held in civil contempt." *See id.*

"Failure to comply with an order of the court is civil contempt only when the noncompliance is willful *and* '[t]he person to whom the order

is directed is able to comply with the order *or* is able to take reasonable measures that would enable the person to comply with the order.' " *Carter v. Hill*, 186 N.C. App. 464, 466, 650 S.E.2d 843, 844 (2007) (quoting N.C. Gen. Stat. § 5A-21(a)(3)) (2005) (emphasis supplied)). Under the unambiguous words in the statute and our precedents, Defendant's willfulness in his breach and nonpayment of child support and his ability to purge his contempt are separate and distinct issues. *Id.*

The majority's "balancing" analysis is more suited to the initial determination of what Defendant could and should pay for child support, which is not the issue at show cause. At the contempt hearing, Defendant acknowledged his past accumulation and nonpayment of his child support obligations. The correct inquiry on show cause is what Defendant could have paid, but did not pay, after he exempted and satisfied his basic needs of subsistence.

Any inquiry into the continued reasonableness of the agreed upon and established support obligations is proper at a modification hearing, not a contempt hearing. *See Bogan v. Bogan*, 134 N.C. App. 176, 179, 516 S.E.2d 641, 643 (1999) (a trial court's order allowing a partial payment of support obligation at a contempt proceeding did not constitute a modification, because such modification is only allowed "upon motion in the cause and a showing of changed circumstances by either party.") (citation omitted).

Defendant's past willfulness of nonpayment can be ascertained through "an inventory of his financial condition" and findings by the trial court of his "assets and liabilities *and* his ability to pay and work." *Bennett v. Bennett*, 21 N.C. App. 390, 394, 204 S.E.2d 554, 556 (1974) (emphasis supplied) (citation omitted). Defendant's ability to purge his contempt must additionally satisfy the "present ability test," which requires the defendant to "possess some amount of cash, or asset readily converted to cash." *McMiller v. McMiller*, 77 N.C. App. 808, 809, 336 S.E.2d 134, 135 (1985).

In this case, Defendant expressly acknowledged his duty to support his children. Defendant entered into two voluntary support agreements ordering him to pay a little over $300.00 per month in total to support his children. Defendant accumulated a repeating history of nonpayment and breaches of his support agreement and obligations. At the time the most recent show cause hearing was held, Defendant had accumulated and owed nearly $32,000.00 in past due and unpaid child support.

III. Burden at Hearing

Defendant does not contest that he was properly served with the motion and order to show cause. At the show cause hearing, Plaintiff presented evidence of the amount of accumulated arrears Defendant owed. The burden then shifted and rested upon Defendant to overcome the allegations of willful breach of his admitted obligations and nonpayment, and to show any cause why he should not be held in contempt. *See Moss*, 222 N.C. App. at 77, 730 S.E.2d at 204-05. Defendant appeared with counsel and offered evidence of his income, expenses, and assets at the hearing.

Defendant provided competent evidence of his income and expenditures, including estimates on the values of his car and boat, his monthly income from gifts and selling junk cars, and his living expenses, which included payments he had made for gas, automobile liability insurance, and a cell phone in addition to expenses for food, clothing, and shelter.

The majority's opinion correctly states: "An obligor may be held in contempt for failure to pay less than he could have paid, even if not the entire obligation, but the trial court must find that he has the ability to fully comply with any purge conditions imposed upon him." *Spears v. Spears*, 245 N.C. App. 260, 278, 784 S.E.2d 485, 497 (2016).

The majority's opinion also correctly states the trial court's unchallenged findings of fact are based upon competent evidence:

> i. "The Defendant owns a boat." Defendant does not challenge this finding as unsupported by the evidence. He did own a boat. . . .
>
> ii. "The Defendant owns a car." Defendant does not challenge this finding as unsupported by the evidence. He did own a car. . . .
>
> iii. "The Defendant spends money on gas." Defendant does not challenge this finding as unsupported by the evidence. He did buy a little gas. . . .
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> . . . .
>
> viii. "The Defendant pays car insurance in the amount of $147.00 per month." Defendant challenges this finding as unsupported by the evidence because by the time of the second hearing date, defendant had cancelled his car insurance. . . .

. . . .

x. "The Defendant has a cell phone." The defendant does not challenge this finding as unsupported by the evidence.

None of these items are "basic necessities" for self-sustenance to excuse Defendant from breach of his priority obligations to support his children. It is not the role of this appellate court to re-weigh the competent evidence on these unchallenged and binding findings of fact, which support the trial court's conclusion.

IV. Standard of Review

The majority's opinion correctly states: "Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment. North Carolina's appellate courts are deferential to the trial courts in reviewing their findings of fact." *County of Durham v. Hodges*, __ N.C. App. __, __, 809 S.E.2d 317, 323 (2018). That standard of review is misapplied by re-weighing the evidence on appeal.

The record and transcript contain competent evidence to support the trial court's finding Defendant possessed money and assets above his "basic necessities," had been and was able to help meet a portion of his support obligations, and had failed to support his children. This evidence supports the trial court's conclusion that Defendant's failure was, and his continued failure to pay his child support obligations is, willful. *See Hill*, 186 N.C. App. at 466, 650 S.E.2d at 888.

Precedents require us on appellate review to defer to the trial court's findings and conclusion in contempt hearings. Our review of "contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Watson v. Watson*, 187 N.C. App. 55, 64, 652 S.E.2d 310, 317 (2007) (citation omitted). "Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by *any competent evidence* and are *reviewable only for the purpose of passing upon their sufficiency* to warrant the judgment." *Hartsell v. Hartsell*, 99 N.C. App. 380, 385, 393 S.E.2d 570, 573 (1990) (emphasis supplied) (citation omitted)). "[T]he court is not limited to ordering one method of payment to the exclusion of the others provided in the statute. The Legislature's use of the disjunctive and the phrase 'as the court may order' clearly shows that the [trial] court is to have broad discretion in

providing [and ordering] for payment of child support orders." *Moore v. Moore*, 35 N.C. App. 748, 751, 242 S.E.2d 642, 644 (1978).

If, as the majority's opinion asserts, despite the established and unchallenged nonpayment and the competent evidence provided by Defendant, the findings of fact by the trial court are insufficient to support a conclusion Defendant has the present ability to purge, it is not necessary to vacate the entire order. Defendant still has failed to meet his burden at the show cause hearing why he should not be held in willful contempt for his past and admitted failures to pay child support and the $32,000.00 of accumulated debt under his voluntary agreement and the trial court's order. *Spears*, 245 N.C. App. at 278, 784 S.E.2d at 497.

If the trial court's findings do not support the conclusion that Defendant has the present ability to purge his willful contempt, upon remand for further findings of fact Defendant must show the amounts he can pay to purge his contempt or seek reduction of the purge conditions.

Defendant is not entitled to the findings and conclusions of his past breaches of his agreed-upon and very modest support obligations to his children being vacated. The competent evidence and unchallenged findings clearly show Defendant had money and hoarded assets well above his basic living necessities, and willfully spent money admittedly owed to the children on a cell phone, boat, car, gas, and insurance, instead of meeting his agreed-upon and lawful support obligations to his children.

While the trial court, *sua sponte*, did set purge conditions that are higher than DSS had initially sought, Defendant's own evidence shows he had additional means and capacity to pay beyond what he did pay and what DSS initially sought for him to purge. *See Shippen v. Shippen*, 204 N.C. App. 188, 190, 693 S.E.2d 240, 243 (2010) ("a failure to pay may be willful within the meaning of the contempt statutes where a supporting spouse is unable to pay because he or she voluntarily takes on additional financial obligations or divests him or herself of assets or income after entry of the support order." (citation omitted)).

A finding indicating Defendant's failure to pay is willful and that he has the ability to comply "while not as specific or detailed as might be preferred, is minimally sufficient." *Id.* at 191, 693 S.E.2d at 244. The evidence, findings, and order before us clearly meets and exceeds that standard.

At most on remand, Defendant can attempt to meet his purge and/or can argue for a reduction of the purge amount or conditions. *Tyll v. Berry*, 234 N.C. App. 96, 112, 758 S.E.2d 411, 422 (2014) ("The trial court, therefore, erred in requiring the monetary payments without first

finding defendant was presently able to comply with the $2,500.00 fine imposed as a result of defendant's past contempt").

V. Conclusion

The issue in this case is whether Defendant's past failures to pay his support obligations were willful, not the reasonableness of the support obligation. Defendant voluntarily agreed to meet his most basic and legal obligations to support for his children and does not challenge that he willfully failed to do so. Defendant's own evidence shows he possessed funds and property above his basic necessities, failed to pay his child support, spent his money and time on other things, hoarded assets available to discharge his obligations, and breached and ignored his "universally recognized" duty to support his children. *See Wells*, 227 N.C. at 618, 44 S.E.2d at 34. Defendant has failed to meet his burden to "show cause why he should not be held in civil contempt[.]" *Moss*, 222 N.C. App. at 77, 730 S.E.2d at 204-05.

Under our standard of review, and Defendant's admitted breaches, it is unnecessary and a waste of judicial resources to vacate the trial court's unchallenged findings and conclusions on Defendant's willfulness. Such evidence and unchallenged findings show the Defendant's actions were volitional and his failure to support was willful. The trial court's unchallenged findings and conclusions that Defendant failed to pay his child support and has failed to meet his burden to show cause why he should not be held in willful contempt is properly affirmed. Presuming the purge amount may exceed the Defendant's admitted present abilities, remand is appropriate for supplemental findings on Defendant's present ability to purge or for him to seek reduction thereof. I respectfully concur in part and dissent in part.

EVERETT'S LAKE CORPORATION, PLAINTIFF
v.
LEWIS EDWARD DYE, JR., DEFENDANT

No. COA18-360

Filed 16 October 2018

Waters and Adjoining Lands—riparian rights—non-commercial fishing—granted to predecessor in title

Defendant landowner had the right to fish in plaintiff's lake based on the riparian right originally granted to a predecessor in title in an earlier deed.

Appeal by Plaintiff from Amended Order entered 30 November 2017 by Judge Richard T. Brown in Richmond County Superior Court. Heard in the Court of Appeals 19 September 2018.

Anderson, Johnson, Lawrence & Butler, L.L.P., by Steven C. Lawrence, for the Plaintiff-Appellant.

Lewis Edward Dye, Jr., pro se.

DILLON, Judge.

Plaintiff Everett's Lake Corporation owns Everett's Lake (the "Lake"), a non-navigable lake in Richmond County. Defendant Lewis Edward Dye, Jr., owns a small tract of land, comprising approximately two-tenths of an acre, which abuts the Lake. This dispute concerns whether Defendant, through his chain of title in his small tract, also owns the right to access the Lake.

I. Background

As of 1948, the Lake and the land around the Lake were all owned by the Lamb family.

Defendant's Chain of Title

In 1948, the Lambs conveyed a thirty-acre tract which abutted the Lake to the Entwistles. In the Lamb's 1948 deed to the Entwistles (the "1948 Deed"), the Lambs not only conveyed the tract of land, but also conveyed certain rights to use the adjacent Lake for non-commercial purposes. Specifically, the 1948 Deed stated as follows:

> The parties of the first part hereby convey unto the parties of the second part riparian water rights in Everett's Lake on that portion of the above described property bounded by the said Everett's Lake. (This deed is made subject to this restriction. The parties of the second part shall not use the said Everett's Lake for any commercial purpose.) It is further understood and agreed that the parties of the first part are hereby conveying riparian rights in Everett's Lake in connection with a tract of Land owned by the parties of the second part consisting of about 30 acres and located on the South side of the said Everett's Lake.
>
> [. . .]
>
> TO HAVE AND TO HOLD the aforesaid tract or parcel of land, and all privileges and appurtenances thereto belonging, to the said parties of the second part, their heirs and assigns, to their only use and behoof forever.

This deed was duly recorded in 1948.

In 1988, the Entwistles conveyed a 3.55-acre portion of their property abutting the Lake to the Bakers. In 1989, the Bakers conveyed two-tenths of an acre abutting the Lake from their 3.55-acre tract to the Threadgills. And in 2015, the Threadgills conveyed this two-tenths of an acre tract, abutting the Lake, to Defendant and his wife. In each of the above-described conveyances, the grantor conveyed not only a tract of land, but also riparian rights, as described in the 1948 Deed.

Plaintiff's Chain of Title in the Lake

In 1958, ten years after the Lambs conveyed the thirty-acre tract to the Entwistles, the Lambs conveyed the Lake itself to Plaintiffs by warranty deed. This deed contained the following exceptions:

> [E]xcept as to such riparian and other rights which any firm or corporation or any person or persons may have in and to Everett's Lake and use thereof, irrespective of the method by which such rights may have been acquired.

The Dispute

At some point, Plaintiff formed a fishing club (the "Club"), charging members for the right to fish the Lake. In 2007, Plaintiff performed extensive work on the Lake. Plaintiff had an expectation that adjacent landowners would join the Club and pay annual dues of $500.00 if they desired to fish on the Lake. Upon the purchase of his lot in 2015, Defendant began to fish the Lake without joining the Club. As a result,

Plaintiff brought a suit for civil trespass against Defendant. Defendant answered and counterclaimed, seeking a declaration that he had the right to use the Lake.

A bench trial was held in Richmond County Superior Court. The trial court declared that Defendant did have valid riparian water rights "for the reasonable use and enjoyment of Everett's Lake body of water by virtue of such rights acquired from [D]efendant's predecessors entitled to his real property." Plaintiff timely appealed.

II. Standard of Review

We review the Amended Order and its findings of fact for competent, supporting evidence. The trial court's conclusions of law are reviewed *de novo*. *Weaverville Partners v. Town of Weaverville Bd. of Adj.*, 188 N.C. App. 55, 57, 654 S.E.2d 784, 787 (2008).

III. Analysis

The central issue in this matter is whether the trial court correctly determined that Defendant, as the owner of his small tract, has "riparian rights" in the Lake, which include the right to make personal use of the Lake. For the following reasons, we affirm.

The trial court agreed with Defendant that Defendant has the right to fish the Lake based on the "riparian right" originally granted to his predecessor in title in the 1948 Deed. Based on the language in the 1948 Deed, we also agree. We conclude that "riparian rights" in the Lake were part of the "bundle of sticks" that the Lambs conveyed to Defendant's predecessor in title.[1] As the owners of the Lake itself, the Lambs had the right to exclude others from the Lake. *See Hildebrand v. S. Bell Tel.*, 219 N.C. 402, 408, 14 S.E.2d 252, 256 (1941) (recognizing that the right to own property includes "the right to exclude others from its use"). When the Lambs executed the 1948 Deed to Defendant's predecessor in title, the Lambs conveyed "sticks" representing fee simple absolute ownership in the thirty acres adjacent to the Lake. The Lambs also essentially gave up a "stick," namely their right to exclude Defendant's

1. Property has been described as a "bundle of sticks," whereby various people/entities could own different rights in the same real estate. *See United States v. Craft*, 535 U.S. 274, 278 (2002) (describing property as a "bundle of sticks"). For example, one may own a life estate interest in certain property, another may own a remainder interest in that property, another may have an easement to use the property, the State has the right to condemn the property, and a bank may have a lien against that property. *See also In re Greens of Pine Glen*, 356 N.C. 642, 651, 576 S.E.2d 316, 322 (2003) (describing that property includes a "bundle of rights" which can be held by various parties).

predecessor in title from using the Lake as a "riparian right" owner, so long as these rights were used for non-commercial purposes. Therefore, when the Lambs conveyed their fee simple interest in the Lake itself to the Plaintiff in 1958, the Lambs could only convey the sticks they still owned in the Lake, which did not include the "riparian rights" nor the "right to exclude" sticks already conveyed to Defendant's predecessor in title. In fact, the 1958 deed to the Plaintiff recognizes that the fee simple interest in the Lake being conveyed by the Lambs was subject to the riparian rights in the Lake already owned by others.

Plaintiff argues that the Lambs' conveyance in the 1948 Deed of "riparian water rights . . . on that portion of the [thirty-acre tract] bounded by [the Lake]" was ambiguous and, therefore, did not convey any rights to use the Lake. We disagree. Indeed, our Supreme Court has held as follows with regard to interpreting language in a deed:

> It is . . . a general rule that the deed must be upheld, if possible, and the terms and phraseology of description will be interpreted with that view and to that end, if this can reasonably be done. The Court will effectuate the lawful purposes of deeds and other instruments if this can be done consistently with the principles of rules of law applicable.

N.C. Self Help v. Brinkley, 215 N.C. 615, 619, 2 S.E.2d 889, 892 (1939). We conclude that the phraseology and terms used in the 1948 Deed clearly evince an intent to convey the right to enjoy the Lake for non-commercial purposes: "[The Lambs] are hereby conveying riparian rights in Everett's Lake" and "[Defendant's predecessor in title] shall not use the said Everett's Lake for any commercial purpose." Our Supreme Court has held that "riparian rights" include the right of a landowner "to make reasonable use of the waters" adjacent to his land. *Dunlap v. Carolina Power & Light*, 212 N.C. 814, 818, 195 S.E. 43, 46 (1938). This right includes the right to fish. *See*, *e.g.*, *Hampton v. N.C. Pulp*, 223 N.C. 535, 548, 27 S.E.2d 538, 546-47 (1943) (recognizing the right to fish is a riparian right).

Plaintiff further argues that the 1948 Deed from the Lambs to the Entwistles only created an "easement in gross." That is, Plaintiff argues, the 1948 Deed only conveyed a *personal* right to the Entwistles to use the Lake which was not transferable to successors in title. We disagree. We conclude, rather, that the language of the 1948 Deed did not convey an easement in gross, but rather a right which ran with the portion of the thirty-acre tract which abutted the Lake.

The 1948 Deed grants riparian rights "on that portion of the above described property bounded by the said Everett's Lake." The 1948 Deed states that the rights were being conveyed "in connection with a tract of land owned by the parties of the second part consisting of about 30 acres and located on the South side of the said Everett's Lake." Finally, the 1948 Deed states that the grant was to Defendant's predecessor, "their heirs and assigns to their only use and behoof forever." The language in the 1948 Deed indicates an intention on behalf of the Lambs for the riparian rights to run with the land, at least that portion of the thirty-acre tract which directly abutted the Lake. Therefore, we affirm that Defendant does have valid riparian rights in the Lake, including the right to fish.

We note that the trial court did *not* base its ruling on the "public trust doctrine." Indeed, Defendant made no argument that his right to fish the Lake stems from the application of the public trust doctrine. The public trust doctrine applies only to those bodies of water which are determined to be navigable. *See*, *e.g.*, *State ex rel. Rohrer v. Credle*, 322 N.C. 522, 526, 369 S.E.2d 825, 827-28 (1988). And the trial court concluded that the Lake is not a "navigable" lake but rather a lake that is privately owned by Plaintiff. This determination is not in dispute on appeal.

Further, though not argued by either party, we recognize that the trial court's holding is *not* based on a theory that Defendant's riparian rights arise from the common law. Our Supreme Court has held that where the boundary of a tract of land is the edge of a non-navigable swamp, there is no "common law" right of that land-owner to use the swamp. *See Kelly v. King*, 225 N.C. 709, 714, 36 S.E.2d 220, 223 (1945). And, here, Defendant's deed cites the edge of the Lake, which the trial court found to be non-navigable, as one of the boundaries. *Kelly*, though, is not applicable to the present case as Defendant's right springs from an express grant contained in his chain of title, not from the operation of some common law principle.

IV. Conclusion

The trial court correctly concluded that Defendant has certain riparian rights to make reasonable use and enjoyment of the Lake for non-commercial purposes based on the grant of "riparian rights" in Defendant's chain of title.

AFFIRMED.

Judges ELMORE and DAVIS concur.

HAMLET H.M.A., LLC D/B/A SANDHILLS REGIONAL MEDICAL CENTER, PLAINTIFF
v.
PEDRO HERNANDEZ, M.D., DEFENDANT

No. COA17-744

Filed 16 October 2018

1. Contracts—repayment of physician recruitment loans—compromise verdict—multiple components

The jury's verdict awarding repayment of loans that were made by a hospital to a physician under a Physician Recruitment Agreement was not a compromise verdict requiring a new trial even though it only awarded $334,341.14 of the $902,259.66 total loan amount. The amount of the verdict, standing alone, was not sufficient to show an abuse of discretion by the trial court in denying defendant physician's motion for a new trial, because extensive evidence was presented that the total sum comprised 21 payments stemming from different types of obligations.

2. Unfair Trade Practices—learned profession exception—physician claim against hospital—employment contract

In an issue of first impression, the Court of Appeals held that a defendant physician's claim that a hospital made false representations to induce him to enter an employment contract involved a business arrangement, not professional services rendered, and was therefore not exempt from the Unfair and Deceptive Trade Practices Act (UDTP) under the learned profession exception. The trial court erred by granting directed verdict dismissing defendant's UDTP claim.

3. Appeal and Error—preservation of issues—contemporaneous objection—identification of improper evidence

In a dispute between a hospital and a physician regarding an employment agreement, defendant physician failed to preserve for appellate review his argument that the jury should not have been allowed to consider parol evidence. In a nine-day trial with extensive testimony and documentary evidence, even if defendant's "continuing objection" to parol evidence was valid, defendant's brief did not clearly identify the specific evidence he claimed should not have been admitted, precluding an opportunity to respond by plaintiff as well as appellate review.

4. Evidence—breach of contract—parol evidence—Rule 59 motion

In a dispute between a hospital and a physician regarding an employment agreement, where defendant physician failed to preserve for appellate review his argument that the jury should not have been allowed to consider parol evidence, the Court of Appeals determined all of the evidence was properly before the jury and defendant's argument that his Rule 59 motion for a new trial should have been granted was without merit.

Judge DAVIS dissenting in part with separate opinion.

Appeal by defendant from judgment and order entered 9 January 2017 by Judge Richard T. Brown in Superior Court, Richmond County. Heard in the Court of Appeals 21 March 2018.

Thomerson Freeman & Rogers P.C., by William S. F. Freeman, for plaintiff-appellee.

Mark L. Hayes, for defendant-appellant.

STROUD, Judge.

Defendant Pedro Hernandez, M.D. ("defendant") appeals a judgment upon a jury verdict finding him liable for breach of contract and an order denying his motions for judgment notwithstanding the verdict and for a new trial. Defendant has raised three issues on appeal regarding the judgment and order. First, defendant has failed to demonstrate that the trial court abused its discretion in denying his motion for new trial based upon his claim of a compromise verdict. Second, the trial court improperly dismissed defendant's Unfair and Deceptive Trade Practices ("UDTP") counterclaim based upon the "learned profession" exception to N.C. Gen. Stat. § 75.1-1. Last, defendant failed to preserve his argument regarding erroneous admission of parol evidence. We therefore reverse and remand in part and affirm in part the trial court's judgment.

I. Background

Defendant is a physician who moved from Maine to North Carolina to be closer to his family. He had been practicing in Maine since 2008. In March of 2011, before he and his wife moved, defendant used an online portal called MedHunters to look for open medical positions in North Carolina. He sent seven hospitals an interest email, including plaintiff Sandhills Regional Medical Center, a hospital owned and operated by

plaintiff Hamlet H.M.A. LLC.[1] Plaintiff responded immediately, and on 16 March and 17 March 2011, plaintiff paid for defendant to visit the Hospital and plaintiff. Plaintiff made an offer to defendant five days after his visit.

The original offer was for defendant to set up his own independent practice and to be an independent contractor for plaintiff. The offer guaranteed a minimum collection amount for the first 18 months of the 36-month contract. The income guarantee was described in the email with the offer attached. Mr. Michael McNair, the CEO of the Hospital at the time, testified: "the theory is, as his practice develops over a period of time and his practice starts bringing in more money from him seeing patients and doing surgery and those kind of things, then the amount that you get paid [by plaintiff] gets less."

Plaintiff also offered defendant an employment option as an addendum to the original offer, which plaintiff could exercise at the end of the first 18 months of the contract. The employment option section specified that the option would "at a minimum, include the following material terms and conditions: Proposed Duration: 18 months. Proposed Compensation Methodology for Employment Agreement: Base Salary $325,000 with a bonus based on worked RVUs."[2]

Defendant clarified in two emails dated 23 March 2011 and 24 March 2011 that he was not comfortable with this arrangement. Instead, he asked to be an employee with a regular salary like the other doctors employed by Plaintiff. Plaintiff sent defendant an employment offer on 25 March 2011 with a base salary of $275,000 and several other incentives. Defendant responded four hours later that he did not think it made sense to accept less money for an employee position or status.

Defendant then sent plaintiff an email asking to extend the time period of guaranteed income to 24 months, rather than 18 months. Plaintiff replied that it could not extend the period but raised the monthly salary from $47,616.82 to $49,500.00 and also added a signing bonus of $30,000.00. After further negotiations, the parties entered into a Physician Recruitment Agreement on 29 March 2011.

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1. We will refer to Hamlet H.M.A., LLC as "plaintiff" and the Sandhills Regional Medical Center operated by plaintiff as "the Hospital."

2. Mr. McNair testified that "RVUs" refers to "relative value units" and explained that this portion of the agreement was "the bonus piece that's based upon your productivity RVUs, relative value units. That's a fairly common term in physician contracting language."

Defendant started his practice at the Hospital on 1 September 2011 and was to work until 1 September 2014 based upon the 36-month contract requirement. The practice was not successful, and at the end of the first 18-month period, defendant timely notified plaintiff of his desire to exercise the employment option in his contract. But plaintiff did not give defendant an employment contract at the end of the 18-months. The Physician Recruitment Agreement defendant signed required plaintiff to offer defendant an employment contract on one of plaintiff's standard template forms at the end of the first 18 months, should defendant exercise the option. Plaintiff believed the Physician Recruitment Agreement itself to be the employment contract, since it was on a standard template form and stated the amount his salary would be as an employee, so plaintiff did not send defendant an employee contract.

Defendant closed his practice in April 2013, so defendant did not practice for the full 36-month period. Plaintiff informed defendant that whether defendant became an employee of Plaintiff or not, he was still required to practice for the 36 month period. When defendant did not receive an 18-month employment contract from plaintiff, he began looking for other work. Plaintiff made several requests to defendant demanding repayment of its loans made during defendant's first 18 months of practice, but defendant did not repay them.

On 29 August 2014, plaintiff filed a complaint against defendant alleging breach of contract and demanding repayment of the entire amount paid to defendant, a total of 21 payments amounting to $902,259.66. Defendant filed an answer with counterclaims for breach of contract, fraud, unfair or deceptive trade practices, and unjust enrichment. A jury trial was held in Superior Court in Richmond County at the end of August and beginning of September 2016. The jury returned a verdict for plaintiff for $334,341.14. Defendant filed a Motion for Judgment Notwithstanding the Verdict and a Motion for New Trial on 8 September 2016. On 9 January 2017, the trial court entered judgment on the jury verdict and issued an order denying both of defendant's post-trial motions. Defendant timely appealed to this Court from both the order denying the motions and the judgment.

II. Compromise Verdict

[1] Defendant contends that the jury reached an impermissible compromise verdict when it found that defendant owed $334,341.14, instead of $902,259.66.

a. Standard of Review

We review an appeal from denial of a motion for new trial based upon an alleged compromise verdict for abuse of discretion. *See Smith v. White*, 213 N.C. App. 189, 195, 712 S.E.2d 717, 721 (2011) ("An appeal from a trial court's denial of a motion for new trial because of an alleged compromise verdict is reviewed for an abuse of discretion."). The party seeking to show an abuse of discretion has the burden of demonstrating that the verdict was a compromise. *Id.* Our Supreme Court has stressed that we should not review this discretionary ruling except in "rare cases":

> It has been long settled in our jurisdiction that an appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge. The legislative enactment of the Rules of Civil Procedure in 1967 did not diminish the inherent and traditional authority of the trial judges of our state to set aside the verdict whenever in their sound discretion they believe it necessary to attain justice for all concerned, and the adoption of those Rules did not enlarge the scope of appellate review of a trial judge's exercise of that power. The principle that appellate review is restricted in these circumstances is so well established that it should not require elaboration or explanation here. Nevertheless, we feel compelled by the Court of Appeals' disposition of the case before us to restate and reaffirm today the basic tenets of our law which would permit only circumscribed appellate review of a trial judge's discretionary order upon a Rule 59 motion for a new trial. Those tenets have been competently set forth in innumerable prior opinions of this Court, and, for instructive purposes, we provide the following sampling therefrom.
>
> In *Settee v. Electric Ry.*, 170 N.C. 365, 367, 86 S.E. 1050, 1051 (1915), the Court evinced a positive hesitancy to review such discretionary rulings by the trial court except in rare cases: While the necessity for exercising this discretion, in any given case, is not to be determined by the mere inclination of the judge, but by a sound and enlightened judgment in an effort to attain the end of all law, namely, the doing of even and exact justice, we will

> yet not supervise it, except, perhaps, in extreme circumstances, not at all likely to arise; and it is therefore practically unlimited.

Worthington v. Bynum, 305 N.C. 478, 482, 290 S.E.2d 599, 602-03 (1982) (citations and quotation marks omitted).

b. Analysis

Defendant contends the jury's verdict is a compromise verdict so it must be set aside. "A compromise verdict is one in which the jury answers the issues without regard to the pleadings, evidence, contentions of the parties or instructions of the court. The dollar amount of the verdict alone is insufficient to set aside the verdict as being an unlawful compromise." *Smith*, 213 N.C. App. at 195, 712 S.E.2d at 721 (citations and quotation marks omitted).

> Where it appears that the verdict was the result of a compromise, such error taints the entire verdict and requires a new trial as to all of the issues in the case. If the award of damages to the plaintiff is grossly inadequate, so as to indicate that the jury was actuated by bias or prejudice, or that the verdict was a compromise, the court must set aside the verdict in its entirety and award a new trial on all issues.

Robertson v. Stanley, 285 N.C. 561, 569, 206 S.E.2d 190, 195-96 (1974) (citation and quotation marks omitted).

Defendant argues that the verdict here is a compromise verdict much like an example noted in *Bartholomew v. Parrish*, 186 N.C. 81, 118 S.E.2d 889 (1923). The Court in that case set forth this example:

> [I]f a suit were brought upon a promissory note, which purported to be given for $100, and the only defense was that the defendant did not execute the note, and the jury should return a verdict for $50 only, it would not be allowed to stand; for it would neither conform to the plaintiff's evidence, nor to that of the defendant. It would be a verdict without evidence to support it; and it is not to be tolerated that the jury should thus assume in disregard of the law and evidence, to arbitrate the differences of parties, or to decide according to some supposed natural equity, which in reality is merely their own whim.

Id. at 84, 118 S.E.2d at 900; *see also Smith*, 213 N.C. App. at 195, 712 S.E.2d at 721 ("A compromise verdict is one in which the jury answers

the issues without regard to the pleadings, evidence, contentions of the parties or instructions of the court."). Defendant argues that but for the numbers, this case is almost identical to the example in *Bartholomew*, 186 N.C. at 84, 118 S.E.2d at 900. At trial, the parties entered into a stipulation that plaintiff loaned defendant $902,259.66. Defendant disputed only that he had a legal obligation to repay plaintiff any of the payments. He argued he had no obligation to pay plaintiff at all because plaintiff breached the contract first by not fulfilling its obligation to give him an employment contract at the end of the first 18 months. The employment contract was an optional provision, but defendant had notified plaintiff of his intention to exercise the option in a timely fashion. Defendant argues that based upon the issues and the stipulation of the amount of potential damages plaintiff may recover, the jury could return a verdict for $902,259.66 or for nothing at all. *See also Wiles v. Mullinax*, 275 N.C. 473, 485-86, 168 S.E.2d 366, 375-76 (1969) (determining that because the damages were stipulated at trial, they were not of issue and would not be reconsidered in a new trial). Because the verdict was $334,341.14, defendant contends the jury apparently came to a compromise by including the amounts on some of the checks in evidence at the trial but excluding others.

Plaintiff contends that defendant has not demonstrated a compromise verdict simply by the amount of damages so the trial court did not abuse its discretion by denying his motion for new trial.[3] Although the parties had stipulated that the total sum paid to defendant was $902,259.66, the 21 payments plaintiff paid to defendant were also in evidence, and the parties presented much testimony and other evidence regarding the various obligations and amounts related to each. The Physician Recruitment Agreement included payments and financial obligations of several different types, and the checks included amounts based upon different portions of the Agreement. For example, plaintiff notes that it "agreed to provide several categories of financial assistance to [defendant] under the terms of the Recruitment Agreement, including: (i) reimbursement of relocation expenses, up to $15,000; (ii) reimbursement of expenses incurred to market the new practice, up to $10,000; (iii) reimbursement of start-up expenses incurred with setting up a new practice, up to $10,000; (iv) a sign-on bonus of $30,000; and (v) for the first eighteen (18) months of the thirty-six (36) month period, a

3. Plaintiff's brief notes that plaintiff did not cross-appeal from the judgment, despite the fact that the jury did not award the total $902,259.66, and it is difficult to see how defendant is an "aggrieved party" since the verdict was far less than it should have been based upon defendant's argument regarding the compromise verdict.

monthly income guarantee of $49,500 against cash collections." In addition, defendant had agreed to be on emergency call at the Hospital and to accept calls for unassigned patients. The parties presented extensive evidence over nine days regarding the various obligations and payments. The verdict sheet had 12 separate issues, and the jury's answers to all of the issues were internally consistent. The jury never indicated any confusion about the issues under consideration.

Plaintiff also notes that this case is not at all like *Bartholomew*, the case with the example quoted above and noted by defendant. In *Bartholomew*, the jury's compromise was obvious both from the number and the notation on the verdict sheet: "In answer to the issue, the jury rendered a verdict in word and figures as follows: '*Compromise*, $283.25.' " *Bartholomew*, 186 N.C. at 83, 118 S.E. at 900 (emphasis added). In addition to labeling the verdict as a "[c]ompromise," the way the jury had calculated the compromise was obvious: "[T]he sum of $283.25 is arrived at by taking one-half of the $366.51 and adding to it $100, the sum admitted by the defendant to be due to the plaintiffs." *Id.* at 84, 118 S.E. at 900.

Here, the only evidence defendant can offer of a compromise is the amount of the damages, and given the complex evidence and issues presented, the amount alone does not convince us that the jury reached a compromise verdict. *See Piedmont Triad Reg'l Water Auth. v. Lamb*, 150 N.C. App. 594, 598, 564 S.E.2d 71, 74 (2002) ("The dollar amount of the verdict alone is insufficient to set aside the verdict as being either an unlawful compromise or a quotient verdict."). The cases cited by plaintiff in which the amount of damages could show a compromise verdict involved simple single-issue verdicts. In addition, had the trial court granted defendant's motion, it would logically have granted a new trial on damages only and not on defendant's liability. *See*, *e.g.*, *Handex of Carolinas*, *Inc. v. County of Haywood*, 168 N.C. App. 1, 20, 607 S.E.2d 25, 36-37 (2005) ("A new trial as to damages only should be ordered if the damage issue is separate and distinct from the other issues and the new trial can be had without danger of complication with other matters in the case. It must be clear that the error in assessing damages did not affect the entire verdict." (Citations omitted)). Defendant argues that new trial should have been granted on all issues because of how "interconnected" the issues were, but it is this very "interconnectedness" that also makes it impossible to determine a compromise verdict simply from the amount of the verdict. The jury's answers as to liability were clear, and defendant does not challenge those issues on appeal, other than as noted in the parol evidence argument, so there would have been

no need for a new trial on all issues. *See generally id.* The trial court may have considered a new trial on damages only to be unfair to defendant, considering the complexity of the evidence. This is not one of those rare cases in which we can say that the trial court abused its discretion by denying defendant's motion. *See Smith*, 213 N.C. App. at 195, 712 S.E.2d at 721.

III. Unfair and Deceptive Trade Practices ("UDTP") Claim

[2] Defendant argues the trial court erred by granting entry of directed verdict dismissing his UDTP counterclaim "based on a misapplication of the 'learned profession' exclusion." (Original in all caps).

a. Standard of Review

> The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury. On appeal the standard of review for a JNOV is the same as that for a directed verdict, that is whether the evidence was sufficient to go to the jury. A motion for directed verdict or JNOV should be denied unless the evidence, taken as true and viewed in the light most favorable to the plaintiff, establishes an affirmative defense as a matter of law. Our review is *de novo*.

King v. Brooks, 224 N.C. App. 315, 317-18, 736 S.E.2d 788, 791 (2012) (citations and quotation marks omitted).

b. The Learned Profession Exception

The trial court granted the motion for a directed verdict based upon the learned professional exception to a claim for Unfair and Deceptive Trade Practices. Chapter 75 of the North Carolina General Statutes states:

> (a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.
>
> (b) For purposes of this section, "commerce" includes all business activities, however denominated, but does not include professional services rendered by a member of a *learned profession*.

N.C. Gen. Stat. § 75-1.1(a), (b) (2017) (emphasis added).

In *Reid v. Ayers*, this Court noted a two-part test to determine when the learned profession exception applies: "In order for the learned

profession exemption to apply, a two-part test must be satisfied. First, the person or entity performing the alleged act must be a member of a learned profession. Second, the conduct in question must be a rendering of professional services." 138 N.C. App. 261, 266, 531 S.E.2d 231, 235 (2000) (citations omitted).

There is no dispute that doctors and hospitals are members of a learned profession. *See Wheeless v. Maria Parham Med. Ctr., Inc.*, 237 N.C. App. 584, 589 768 S.E.2d 119, 123 (2014); *see also Burgess v. Busby*, 142 N.C. App. 393, 407, 544 S.E.2d 4, 11-12 (2001); *Gaunt v. Pittaway*, 139 N.C. App. 778, 784, 534 S.E.2d 660, 664 (2000); *Abram v. Charter Medical Corp. of Raleigh*, 100 N.C. App. 718, 722-23, 398 S.E.2d 331, 334 (1990). The first prong of the learned profession exception is satisfied, since both parties are members of a learned profession. *See generally Reid*, 138 N.C. App. at 266, 531 S.E.2d at 235.

The second prong of the test is less clear. None of the cases cited by the parties which address the learned profession exception deal with a dispute arising from a contractual arrangement like this one among members of a learned profession. Since the claims must arise out of "professional services rendered" by a physician, *see* N.C. Gen. Stat. § 75-1.1 (b), where a claim does not arise directly from rendition of professional services, defendant argues that one member of a learned profession may bring a UDTP claim against another member of a learned profession regarding a business dispute unrelated to rendition of medical services.

The pertinent parts of N.C. Gen. Stat. § 75-1.1 provide:

> (a) Unfair methods of competition in or affecting commerce, and *unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.*
>
> (b) For purposes of this section, "commerce" includes all business activities, however denominated, *but does not include professional services rendered by a member of a learned profession.*

N.C. Gen. Stat. § 75-1.1(a)-(b) (emphasis added).

The issue of first impression presented by this appeal is whether the "learned profession" exception set forth in N.C. Gen. Stat. § 75-1.1(b) applies to a dispute between a physician and a hospital relating to alleged false claims made by the hospital to induce the physician to enter into an employment contract such as the one at issue in this litigation. The gravamen of defendant's UDTP counterclaim is that plaintiff made certain

false representations to him prior to his entering into the contract at issue and that those false representations constituted a violation of N.C. Gen. Stat. § 75.

Although no case has addressed a situation exactly like this one, other cases have interpreted the learned profession exception in some medical contexts. In *Wheeless*, the plaintiff physician brought a claim against the hospital based upon the hospital's complaint to the Medical Board about care provided by the plaintiff physician, but this Court held making a complaint to the Medical Board is integral to the hospital's role in providing medical care and thus falls within the exception:

> It is well-settled by our Courts that a matter affecting the professional services rendered by members of a learned profession therefore falls within the exception in N.C.G.S. § 75-1.1(b). Indeed, our Court has made clear that unfair and deceptive acts committed by medical professionals are not included within the prohibition of N.C.G.S. § 75-1.1(a). This exception for medical professionals has been broadly interpreted by this Court, and includes hospitals under the definition of "medical professionals." In this case, defendants' alleged conduct in making a complaint to the Medical Board is integral to their role in ensuring the provision of adequate medical care. Accordingly, plaintiff's argument is without merit.

Wheeless, 237 N.C. App. at 590-91, 768 S.E.2d at 123-24 (citations, quotation marks, ellipses, and brackets omitted).

Another case which provides guidance into our determination of whether the defendant's claim relates to the rendition of professional services is *Cameron v. New Hanover Memorial Hospital*, 58 N.C. App. 414, 293 S.E.2d 901 (1982). This case was decided under a prior version of N.C. Gen. Stat. § 75-1.1, and this Court held that plaintiffs could not maintain a UDTP claim against the defendant. *See generally Cameron*, 58 N.C. App. at 445-46, 293 S.E.2d at 920-21. The holding was based upon the wording of N.C. Gen. Stat. § 75-1.1 at that time, which referred to a "seller." *See* N.C. Gen. Stat. § 75-1.1 (1975 Replacement). But since Chapter 75 had been amended just before *Cameron*, this Court noted, *in dicta*, that the result would have been the same under the amended version of the statute, which is the version in effect now. *Cameron*, 58 N.C. App. at 446, 293 S.E.2d at 920.

In *Cameron*, the plaintiffs were podiatrists who brought twelve different claims against the defendant hospital arising out of the hospital's

denial of hospital staff privileges. *Id.* at 416, 293 S.E.2d at 904. The claims included allegations based upon the hospital's bylaws and application process, civil conspiracy, interference with contractual rights, "unfair methods of competition and unfair practices" in violation of G.S. 75-1.1, slander, and libel. *Id.* The Court noted that under the newly amended UDTP Act, the podiatrists' UDTP claims against the hospital would be barred by the learned profession exemption:

> We are constrained to add that our conclusion would not be different had we retroactively applied the current version of G.S. 75-1.1(a) & (b) in this case. Plaintiffs contend that the so-called "learned profession" exception in the current G.S. 75-1.1(b) does not exclude defendants' alleged "anticompetitive" conduct because that conduct involves "commercial" activity, not the rendering of "professional services." We do not agree for the following reasons.
>
> At most, plaintiffs' evidence tends to show that Dineen and Thomas have individual, like personal opinions regarding the provision of hospital staff privileges to plaintiffs. Dineen's testimony indicates that his objection to plaintiffs is grounded in their qualifications to practice podiatry in a hospital. Further, upon plaintiffs' final request for an amendment to the New Hanover medical staff bylaws to include hospital staff privileges for podiatrists, the 13 November 1978 minutes of the Executive Committee state that the Credentials Committee recommended that staff privileges for podiatrists "be granted depending upon individual qualifications." Williams' testimony also shows that the New Hanover Board of Trustees considered qualifications as a paramount issue: "As to who has to make the choice, the Board has to determine with what information comes to it, all the information it can determine, whether they feel that those asking privileges have the qualifications that the hospital has set as standard."
>
> This evidence indicates that defendants were acting in large measure pursuant to an "important quality control component" in the administration of the hospital. As one court described it, the hospital's obligation is to exact professional competence and the ethical spirit of Hippocrates as conditions precedent to staff privileges. We conclude that the nature of this consideration of whom to grant

> hospital staff privileges is a necessary assurance of good health care; certainly, this is the rendering of "professional services" which is now excluded from the aegis of G.S. 75-1.1.13. In this respect, the current version of G.S. 75-1.1 is not a substantive change from our prior law. Defendants' motions for a directed verdict upon this issue also were properly granted.

Id. at 446-47, 293 S.E.2d at 920–21 (citations, quotation marks, brackets and footnote omitted).

Cameron dealt with staff privileges at the hospital, and, similar to *Wheeless*, this Court held the case fell within the learned profession exception because the hospital's process of evaluating the professional qualifications of physicians to determine whether a physician should have staff privileges at the hospital was necessary to assure "good health care" at the hospital. *Id.*

These cases addressing UDTP claims in a medical context do not suggest that negotiations regarding a business arrangement, even between a physician and a hospital, are "*professional services rendered* by a member of a learned profession." N.C. Gen. Stat. § 75-1.1(a) (emphasis added). In *Wheeless*, the Court found that certain medical professionals making a complaint to the North Carolina Medical Board alleging that Dr. Wheeless had engaged in inappropriate and disruptive behavior fell within the learned profession exception because complaining to the medical board was "integral to their role in ensuring the provision of adequate medical care." 237 N.C. App. at 591, 768 S.E.2d at 124. In *Cameron*, the issue related to whether the plaintiff podiatrists should be granted staff privileges. The Court found that because the "consideration of whom to grant staff privileges is a necessary assurance of good health care[,] certainly, this is the rendering of 'professional services' which is . . . excluded from the aegis of [N.C. Gen. Stat. §] 75-1.1." 58 N.C. App. at 447, 293 S.E.2d at 921.

This case involves a business deal, not rendition of professional medical services. Defendant alleged that the hospital made false representations to induce him to enter into a contract; the fact that he is a physician does not change the nature of the negotiation of a business contract. Plaintiff declined to enter into an employment contract with defendant; if defendant had been an employee of plaintiff, this situation may be somewhat more similar to *Wheeless* and *Cameron*, but plaintiff wanted defendant to be an independent contractor with an independent practice. If we were to interpret the learned profession exception

as broadly as plaintiffs suggest we should, any business arrangement between medical professionals would be exempted from UDTP claims. The learned profession exception does not cover claims simply because the participants in the contract are medical professionals. For example, if a physician entered into a lease agreement for space in a medical office building owned by a group of physicians or hospital and then seeks to bring a UDTP claim based upon a dispute over the lease, it should be treated no differently than a similar lease arrangement for parties in any other business. The fact that medical services will be provided in the building does not mean that the lease arrangement arises from rendition of professional services and has no effect on the quality of the medical care provided.

Taking the evidence in the light most favorable to defendant, as we must in reviewing a directed verdict, the trial court should have submitted defendant's UDTP claim to the jury. The trial court therefore erred by granting directed verdict as to defendant's UDTP counterclaim.

IV. Parol Evidence

[3] [4] Defendant argues that "the jury's verdict as to [defendant's] alleged breach of contract was unsupported by the plain terms of the agreement and the uncontroverted evidence. The jury was only able to reach its verdict by the impermissible use of parole [sic] evidence." (Original in all caps).

Defendant argues that the trial court should have granted his Rule 59 motion because of the improper parol evidence.

> The standard of review for denial of a Rule 59 motion is well-settled: According to Rule 59, a new trial *may* be granted for the reasons enumerated in the Rule. By using the word *may*, Rule 59 expressly grants the trial court the discretion to determine whether a new trial should be granted. Generally, therefore, the trial court's decision on a motion for a new trial under Rule 59 will not be disturbed on appeal, absent abuse of discretion. This Court recognizes a narrow exception to the general rule, applying a *de novo* standard of review to a motion for a new trial pursuant to Rule 59(a)(8), which is an error in law occurring at the trial and objected to by the party making the motion.

Kor Xiong v. Marks, 193 N.C. App. 644, 654, 668 S.E.2d 594, 601 (2008) (citation, quotation marks, and brackets omitted).

In this case, defendant contends that the typical abuse of discretion standard applies, and defendant's argument presents two discrete issues. Defendant argues that without the admission of improper parol evidence regarding the parties' contract negotiations, the evidence would have been insufficient to support the verdict. The first issue is whether the trial court abused its discretion in admitting the alleged improper parol evidence. *See generally id.* If so, the second issue is whether the remaining evidence could support the verdict. If the trial court did not abuse its discretion in admission of the alleged parol evidence, then we need not consider the remainder of this argument, since there would be sufficient evidence to support the jury verdict. *See generally Nguyen v. Burgerbusters, Inc.*, 182 N.C. App. 447, 454, 642 S.E.2d 502, 508 (2007) ("[A] review of the record evidence before this Court shows that while defendant presented evidence in support of its position, plaintiff's evidence was sufficient to support the jury verdict. The jury verdict is not contrary to the greater weight of the evidence nor contrary to law, and defendant has not shown that the trial court abused its discretion in denying defendant's motion for new trial." (Citation omitted)).

Since the first portion of this argument deals with the admission of evidence, we must first consider whether the defendant preserved his objection to the particular evidence. As to preservation, defendant argues that

> After the jury returned its verdict, [defendant] filed a motion for a new trial based on the following argument: "The jury was improperly allowed to consider matters and things which were barred by the parole [sic] evidence rule, and as a result the verdict was based on improper evidence, and must be set aside." [Defendant] had already established his concern about the improper use of parole [sic] evidence as the jury considered the breach of contract claims, lodging a standing objection to [plaintiff's] parole [sic] evidence exhibits and questions. Counsel for [defendant] referenced these objections in its argument on the Rule 59 motion.

Our first difficulty with defendant's argument is that we are unable to identify exactly what evidence he contends was improperly admitted. At the beginning of the trial, before presentation of any evidence, defendant did "establish[ ] his concern" about potential parol evidence issues and counsel for both parties discussed this concern with the trial

court.[4] Defendant noted that he would object to some of the evidence of emails and other negotiations plaintiff may seek to present as improper parol evidence. But since defendant brought counterclaims other than breach of contract, such as the fraud and UDTP claims, defendant also planned to introduce some of the emails and communications prior to the Physician Recruitment Agreement. Defendant contended plaintiff committed fraud in the inducement to get defendant to enter into the Physician Recruitment Agreement, not fraud after the signing of the agreement. Defendant would seek to show that plaintiff fraudulently induced him to enter into the contract and planned to use some of the communications in support of this theory. Plaintiff contended that if defendant wanted to introduce some of the communications leading up to the entry of the Physician Recruitment Agreement, all must be admitted so that the jury could understand the context of the discussion: "[I]f he sends an e-mail but not the reply - I think it all comes in, or none of it comes in." The issue was not resolved at the time, and the trial court noted that it would need to address the evidence as it was presented.

Defendant's brief directs us to only two places in the transcript of nine days of trial where he noted his objections to evidence he contends was improper parol evidence. The first objection came in response to plaintiff's introduction of an email identified as "Plaintiff's Exhibit 12," which was a response from the plaintiff to an email from defendant. The objection was: "Your Honor, just with our objection about the parol evidence." Defendant's second, and final, objection was just after the testimony about Exhibit 12:

> MR. BUCKNER: If Your Honor please. I guess if that was a question, we would object. And ask if we might have a renewed continuing objection to all of the communications before the merged agreement under the parol evidence rule, and also relevance.
>
> THE COURT: Your objection is noted. The objection is overruled. Thank you.
>
> MR. BUCKNER: Then a continuing objection?
>
> THE COURT: Your exception is noted. Yes, sir.
>
> MR. BUCKNER: I don't want to keep interrupting, but --
>
> THE COURT: The Court will note a continuing objection by the defense to questions related to this series of e-mails.

4. Defendant did not file a motion *in limine* seeking to exclude any evidence.

As a general rule, a party must make a contemporaneous objection to evidence to preserve the issue for appellate review. *See State v. Gray*, 137 N.C. App. 345, 348, 528 S.E.2d 46, 48 (2000) ("Based on the established law of this State, because defendant failed to object to the admission of the evidence at the time it was offered, he has failed to preserve this issue for our review."). But even if we were to assume that defendant's "continuing objection" here was a valid objection, defendant's brief has not noted which particular exhibits or testimony he contends would have been covered by this "continuing objection." This trial lasted nine days, and there was extensive testimony and evidence of the emails and other communications between the parties leading up to the entry of the Physician Recruitment Agreement, and certainly some of this evidence defendant used to further his counterclaims of fraud in the inducement and UDTP. We are simply unable to sort out which bits of testimony and which exhibits might fall under defendant's continuing objection to improper parol evidence and which bits are evidence defendant sought to use for his own purposes of showing fraud in the inducement. And since defendant's brief did not clearly identify which evidence it claims was erroneously admitted, plaintiff also did not have the opportunity to respond as to any specific exhibit or testimony but could only argue in broad terms the various reasons the communications prior to the Physician Recruitment Agreement would be admissible. Defendant did not make contemporaneous objections to the alleged parol evidence and did not sufficiently identify the evidence he claims was admitted in error, so he has not preserved this argument for appeal. *See, e.g.*, *id.* Since defendant's argument regarding his Rule 59 motion and sufficiency of the evidence is based upon the jury's consideration of parol evidence, which should not have been admitted, and we have determined that all of the evidence was properly before the jury, we need not address the remainder of defendant's argument. This issue is without merit.

V. Conclusion

For the reasons stated above, we affirm in part and reverse and remand the granting of directed verdict as to defendant's UDTP counterclaim.

AFFIRM IN PART; REVERSE AND REMAND IN PART.

Judge ARROWOOD concurs.

Judge DAVIS dissents in part with separate opinion.

DAVIS, Judge, dissenting in part.

While I concur in the majority's well-reasoned opinion on the remaining issues in this case, I respectfully dissent from Section III of its opinion as I believe the trial court properly granted a directed verdict as to Defendant's counterclaim for unfair and deceptive trade practices under Chapter 75 of the North Carolina General Statutes ("UDTP Claim").

The trial court granted the motion for a directed verdict based upon the "learned profession" exception to UDTP claims. N.C. Gen. Stat. § 75-1.1 states, in pertinent part, as follows:

> (a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.
>
> (b) For purposes of this section, "commerce" includes all business activities, however denominated, but does not include professional services rendered by a member of a *learned profession*.

N.C. Gen. Stat. § 75-1.1(a), (b) (2017) (emphasis added).

In *Reid v. Ayers*, 138 N.C. App. 261, 531 S.E.2d 231 (2000), this Court articulated the following test to determine when the learned profession exception applies: "In order for the learned profession exemption to apply, a two-part test must be satisfied. First, the person or entity performing the alleged act must be a member of a learned profession. Second, the conduct in question must be a rendering of professional services." *Id.* at 266, 531 S.E.2d at 235 (citations omitted).

There is no dispute that doctors and hospitals are members of a learned profession. *See Wheeless v. Maria Parham Med. Ctr., Inc.*, 237 N.C. App. 584, 590, 768 S.E.2d 119, 123-24 (2014), *disc. review denied*, 368 N.C. 247, 771 S.E.2d 284 (2015); *see also Burgess v. Busby*, 142 N.C. App. 393, 407, 544 S.E.2d 4, 11-12, *reh'g denied*, 355 N.C. 224, 559 S.E.2d 554 (2001); *Gaunt v. Pittaway*, 139 N.C. App. 778, 784, 534 S.E.2d 660, 664 (2000), *cert. denied*, 353 N.C. 371, 547 S.E.2d 810 (2001), *cert. denied*, 534 U.S. 950, 151 L. Ed. 2d 261 (2001); *Abram v. Charter Med. Corp. of Raleigh*, 100 N.C. App. 718, 722, 398 S.E.2d 331, 334 (1990), *disc. review denied*, 328 N.C. 328, 402 S.E.2d 828 (1991). Here, the first prong of the test is clearly satisfied as both Plaintiff and Defendant are members of a learned profession.

With regard to the second prong, none of the cases cited by the parties concern a dispute arising from a contractual arrangement between

members of a learned profession similar to the one at issue in the present case. This Court has made clear, however, that the learned profession exception is to be construed broadly.

> It is well-settled by our Courts that a matter affecting the professional services rendered by members of a learned profession therefore falls within the exception in N.C.G.S. § 75-1.1(b). Indeed, our Court has made clear that unfair and deceptive acts committed by medical professionals are not included within the prohibition of N.C.G.S. § 75-1.1(a). This exception for medical professionals has been broadly interpreted by this Court, and includes hospitals under the definition of "medical professionals." In this case, defendants' alleged conduct in making a complaint to the Medical Board is integral to their role in ensuring the provision of adequate medical care. Accordingly, plaintiff's argument is without merit.

Wheeless, 237 N.C. App. at 590-91, 768 S.E.2d at 123-24 (citations, quotation marks, ellipses, and brackets omitted).

Another case that provides guidance on this issue is *Cameron v. New Hanover Mem'l Hosp.*, 58 N.C. App. 414, 293 S.E.2d 901 (1982), *disc. review denied*, 307 N.C. 127, 297 S.E.2d 399 (1982). *Cameron* was decided under a prior version of N.C. Gen. Stat. § 75-1.1, and this Court held that the plaintiffs could not maintain a UDTP claim against the defendant. *Id.* at 446, 293 S.E.2d at 920. We noted, albeit in *dicta*, that the result would have been the same under the amended version of the statute (which is the version currently in effect). *Id.*

In *Cameron*, the plaintiffs were podiatrists who brought a number of claims against the defendant hospital arising out of the hospital's denial of the plaintiffs' request for staff privileges, including a UDTP claim. *Id.* at 446, 293 S.E.2d at 920. This Court noted that even under the newly amended UDTP Act, the podiatrists' UDTP claim against the hospital would be barred by the learned profession exception.

> We are constrained to add that our conclusion would not be different had we retroactively applied the current version of G.S. 75-1.1(a) & (b) in this case. Plaintiffs contend that the so-called "learned profession" exception in the current G.S. 75-1.1(b) does not exclude defendants' alleged "anticompetitive" conduct because that conduct involves "commercial" activity, not the rendering of "professional services." We do not agree for the following reasons.

> At most, plaintiffs' evidence tends to show that Dineen and Thomas have individual, like personal opinions regarding the provision of hospital staff privileges to plaintiffs. Dineen's testimony indicates that his objection to plaintiffs is grounded in their qualifications to practice podiatry in a hospital. Further, upon plaintiffs' final request for an amendment to the New Hanover medical staff bylaws to include hospital staff privileges for podiatrists, the 13 November 1978 minutes of the Executive Committee state that the Credentials Committee recommended that staff privileges for podiatrists "be granted depending upon individual qualifications." Williams' testimony also shows that the New Hanover Board of Trustees considered qualifications as a paramount issue: "As to who has to make the choice, the Board has to determine with what information comes to it, all the information it can determine, whether they feel that those asking privileges have the qualifications that the hospital has set as standard."
>
> This evidence indicates that defendants were acting in large measure pursuant to an "important quality control component" in the administration of the hospital. As one court described it, the hospital's obligation is to exact professional competence and the ethical spirit of Hippocrates as conditions precedent to staff privileges. We conclude that the nature of this consideration of whom to grant hospital staff privileges is a necessary assurance of good health care; certainly, this is the rendering of "professional services" which is now excluded from the aegis of G.S. 75-1.1. In this respect, the current version of G.S. 75-1.1 is not a substantive change from our prior law. Defendants' motions for a directed verdict upon this issue also were properly granted.

Cameron, 58 N.C. App. at 446-47, 293 S.E.2d at 920-21 (citations, quotation marks, brackets and footnote omitted).

Cameron is analogous to the present case as it involved a dispute between medical professionals and a hospital — both members of a learned profession — and the plaintiffs' claims were based upon their attempt to provide medical care as podiatrists at the defendant hospital. Although the claims did not involve breach of contract or a proposed employment arrangement, the effect is essentially the same: the hospital was making arrangements for medical professionals to provide care to patients served at its facilities.

Here, Plaintiff and Defendant were seeking to do the same thing. Plaintiff was making arrangements, or attempting to make arrangements, for Defendant to provide medical care to patients served at its facilities. In this sense, the negotiations and contractual arrangement between Plaintiff and Defendant were "integral to their role in ensuring the provision of adequate medical care." *Wheeless*, 237 N.C. App. at 591, 768 S.E.2d at 124. The agreement even included specific requirements for Defendant to be on emergency call at the Hospital and to accept unassigned patients. Thus, these provisions of the agreement address the rendition of professional services by both the Plaintiff and Defendant and fall within the learned profession exception.

For these reasons, I believe the trial court did not err by granting a directed verdict dismissing Defendant's UDTP claim against Plaintiff. Accordingly, I respectfully dissent.

IN THE MATTER OF D.A., A.A., L.A., L.A.

No. COA18-290

Filed 16 October 2018

1. Termination of Parental Rights—no-merit brief—no issues on appeal—independent review

Where the mother's counsel in a termination of parental rights case filed a no-merit brief pursuant to Rule of Appellate Procedure 3.1(d) and the mother did not file a pro se brief, the Court of Appeals dismissed the appeal without conducting an independent review of the record, because the mother failed to argue or preserve any issues for review. *See In re L.V.*, 260 N.C. App. 201 (2018).

2. Termination of Parental Rights—no-merit brief—mandatory service requirement—frustration of counsel—no issues on appeal

Where the father's counsel in a termination of parental rights case filed a no-merit brief but was unable to send a copy of the required documents to the father pursuant to Rule of Appellate Procedure 3.1(d) because the father refused to divulge his address, the Court of Appeals invoked Rule of Appellate Procedure 2 to suspend the mandatory service requirement of Rule 3.1(d) in light of appellate counsel's exhaustive efforts to locate the father and in the interest of expediting a decision in the public interest. The Court

dismissed the father's appeal pursuant to *In re L.V.*, 260 N.C. App. 201 (2018), because the father failed to argue or preserve any issues for review.

Judge DIETZ concurring in the result only.

Appeal by respondents from order entered 1 December 2017 by Judge Lisa V.L. Menefee in Forsyth County District Court. Heard in the Court of Appeals 12 July 2018.

Gillette Law Firm, PLLC, by Jeffrey William Gillette, for respondent-appellant mother.

Richard Croutharmel, for respondent-appellant father.

Assistant County Attorney Theresa A. Boucher, for petitioner-appellee Forsyth County Department of Social Services.

Administrative Office of the Courts, by GAL Appellate Counsel Matthew D. Wunsche, for guardian ad litem.

MURPHY, Judge.

Respondent-Mother and Respondent-Father appeal from the trial court's order terminating their parental rights to D.A., A.A., L.A., and L.A.[1] Counsel for both Respondents filed no-merit briefs in accordance with Rule 3.1(d). N.C. R. App. P. 3.1(d). While we dismiss the appeals of both Respondents, the procedural posture requires us to address each appeal separately.

RESPONDENT-MOTHER'S APPEAL

[1] On 18 April 2018, counsel for Respondent-Mother filed a no-merit brief pursuant to Rule 3.1(d) certifying that he had "made a conscientious and thorough review of the record on appeal" and "identified no issue of merit on which to base an argument for relief." In full compliance with Rule 3.1(d) counsel for Respondent-Mother sent a letter dated 18 April 2018 to Respondent-Mother informing her of her right to file a *pro se* brief, along with complete copies of the record on appeal and the trial transcript. "Respondent[-Mother]'s counsel complied with

1. Pseudonyms are used throughout this opinion to protect the identity of juveniles and for the ease of reading. *See* N.C. R. App. P. 3.1(b).

all requirements of Rule 3.1(d), and Respondent[-Mother] did not exercise her right under Rule 3.1(d) to file a *pro se* brief. No issues have been argued or preserved for review in accordance with our Rules of Appellate Procedure." *In re L.V., A.V.*, ___ N.C. App. ___, 814 S.E.2d 928, 929 (2018). Respondent-Mother's appeal is dismissed.

RESPONDENT-FATHER'S APPEAL

[2] On 13 April 2018, counsel for Respondent-Father filed a no-merit brief pursuant to Rule 3.1(d) stating that "[a]fter a conscientious and thorough review of the record and the relevant law . . . I am unable to identify any issues with sufficient merit on which to base an argument for relief on appeal." However, Respondent-Father's counsel was unable to send a copy of the required documents to Respondent-Father in full compliance with Rule 3.1(d), stating in the no-merit brief:

> I have attempted to send [Respondent-Father] copies of this brief, the record on appeal, and the transcript along with a letter indicating he can file his own *pro se* brief with instructions on how to do that. My attempts included trying to call his trial attorney at a number listed in the record, emailing his trial attorney, and calling [Respondent-Father] at a phone number listed in the record. However, my attempts to locate [Respondent-Father] have been unsuccessful. The trial attorney's phone number is incorrect and she has not emailed me back. I left a voicemail for the number listed for [Respondent-Father] in the record but I have not received a return call. I will continue to make efforts to locate him and provide him with the above-listed items. In the meantime, I will maintain the packet of items in my file. I have appended a copy of the instruction letter to this brief.

Rule 3.1(d) contains mandatory language requiring service on the represented individual concurrently with the filing of counsel's no-merit brief:

> Counsel *shall* provide the appellant with a copy of the no-merit brief, the transcript, the record on appeal, and any Rule 11(c) supplement or exhibits that have been filed with the appellate court. Counsel *shall* also advise the appellant in writing that the appellant has the option of filing a pro se brief within thirty days of the date of the filing of the no-merit brief and *shall* attach to the brief evidence of compliance with this subsection.

N.C. R. App. P. 3.1(d). After an initial review by this Court and in order to allow for full compliance with Rule 3.1(d), we requested that counsel for Respondent-Father attempt to serve him at two physical addresses found in the Record. On 16 July 2018, counsel certified that he mailed the no-merit letters to the addresses identified. However, on 3 August 2018, counsel further certified that both packages had been returned to him, one marked, "insufficient address," and the other marked, "VTF RTS" (sic).[2] Further, at trial, Respondent-Father testified and refused to divulge his address:

> *Petitioner's Counsel*: Where are you living?
>
> *Respondent-Father*: Now?
>
> *Petitioner's Counsel*: Yes.
>
> *Respondent-Father:* I live in my man cave.
>
> *Petitioner's Counsel*: And what is the address of your man cave?
>
> *Respondent-Father*: I give you my daddy's address.
>
> *Petitioner's Counsel*: No. Where is the address of your man cave?
>
> *Respondent-Father*: I' m not telling.
>
> *Petitioner's Counsel*: You're not telling?
>
> *Respondent-Father*: I told you that the last time. No disrespect to this Court.

This case presents us with an issue of first impression in interpreting Rule 3.1(d)'s mandatory provisions when the client's failure to communicate his current address to appellant counsel frustrates counsel's compliance with the Rule. We have considered guidance from Rule 5(b)(2)(b) of the Rules of Civil Procedure,[3] our decision in *State*

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2. We take judicial notice that UTF RTS is an often-used postal code for "Unable to Forward – Return to Sender."

3. Respondent-Father's counsel's mailings constituted service under Rule 5:

> (b) Service -- How made. -- . . .
>
> Service under this subsection may also be made by one of the following methods:
>
> . . . .

v. Mayfield, 115 N.C. App. 725, 446 S.E.2d 150 (1994),[4] and RPC 223, an ethics opinion issued by the North Carolina State Bar.[5] Even assuming *arguendo* that service was perfected in accordance with Rule 5(b)(2)(b) of the Rules of Civil Procedure, the appeal is otherwise "ripe for appellate

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> (2) Upon a party: . . .
>
> b. By mailing a copy to the party at the party's last known address or, if no address is known, by filing it with the clerk of court.

N.C.G.S. §1A-1, Rule 5(b).

Further, Respondent-Father's counsel's filing of the documents with the Clerk of this Court, including a copy of the proposed letter, constituted service and the same was available to Respondent-Father for inspection at any time. N.C.G.S. § 7B-2901 (2017)("The [juvenile's parent] may examine the juvenile's record maintained pursuant to this subsection and obtain copies of written parts of the record without an order of the court[.]")

4. In an *Anders* setting, not subject to the requirements of Rule 3.1(d), we addressed the appeal without requiring service on the client:

> In this case, defendant's attorney has used all due diligence in attempting to notify defendant of his right to pursue his appeal pro se, and the fault of counsel's failure to so notify defendant must lie with defendant. Accordingly, defendant's counsel has fully complied with the holding in Anders, and the appeal is ripe for appellate review upon the record and briefs before us.

State v. Mayfield, 115 N.C. App. at 727, 446 S.E.2d at 152. Here, counsel for Respondent-Father used all due diligence and this case would otherwise be ripe for appellate review.

5. RPC 223 states:

> When a client stops communicating with his or her lawyer, the lawyer must take reasonable steps to locate and communicate with the client. In the present inquiry, Attorney A's efforts to locate Client A were more than reasonable. However, if the lawyer is still unable to locate the client and the client has made no effort to contact the lawyer, the client's failure to contact the lawyer within a reasonable period of time after the lawyer's last contact with the client must be considered a constructive discharge of the lawyer. Rule 2.8(b)(4) of the Rules of Professional Conduct requires a lawyer to withdraw from the representation of a client if the lawyer is discharged by the client. Therefore, Attorney A must withdraw from the representation.
>
> Attorney A may not file a complaint on behalf of Client A although filing suit might stop the running of the statute of limitations. The determination of the objective of legal representation is the client's prerogative. As the comment to Rule 7.1 observes, "[t]he client has ultimate authority to determine the purposes to be served by legal representation within the limits imposed by law and the lawyer's professional obligation." If a client disappears, the lawyer cannot know whether the client wanted to proceed with the lawsuit, who the client was prepared to sue, and whether the allegations in the complaint are accurate. Therefore, if a client disappears and the lawyer is unable to locate the client after

review" and Respondent-Father's appellate counsel has been constructively discharged. However, given the constitutional right at issue in a termination of parental rights case, we hold that situations such as this must be considered on their own merits on a case-by-case basis. Due to the exhaustive efforts of counsel for Respondent-Father, and in the exercise of our independent discretion, we invoke Rule 2 to "expedite a decision in the public interest" and suspend the mandatory service requirement of Rule 3.1(d).

"Respondent[-Father] did not exercise [his] right under Rule 3.1(d) to file a *pro se* brief. No issues have been argued or preserved for review in accordance with our Rules of Appellate Procedure." *In re L.V.*, *A.V.*, N.C. App. at ___, 814 S.E.2d at 929. Respondent-Father's appeal is dismissed.

CONCLUSION

Respondent-Mother did not file a *pro se* brief after counsel's full compliance with Rule 3.1(d) and her appeal is dismissed. After an individual consideration of the frustration of counsel for Respondent-Father's ability to fully comply with Rule 3.1(d)'s mandatory service requirement, we invoke Rule 2 to suspend that portion of Rule 3.1(d). Respondent-Father did not file a *pro se* brief and his appeal is dismissed.

DISMISSED.

Judge TYSON concurs.

Judge DIETZ concurs in result only.

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reasonable efforts to do so, the lawyer should withdraw from the representation without taking further action on behalf of the client.

Responsibility to Client Who Has Disappeared, N.C. STATE BAR (adopted 12 Jan. 1996), https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-223/.

VINCENT MASTANDUNO, EMPLOYEE, PLAINTIFF
v.
NATIONAL FREIGHT INDUSTRIES, EMPLOYER, AND AMERICAN ZURICH INSURANCE CO., CARRIER, DEFENDANTS

No. COA17-1058

Filed 16 October 2018

1. Appeal and Error—denial of motion to seal worker's compensation award—privacy concerns—interlocutory appeal—substantial right

In an interlocutory appeal from a worker's compensation case, plaintiff's invocation of statutory and constitutional privacy protections sufficiently demonstrated the Full Industrial Commission's order denying his motion to seal his entire file to prevent disclosure of his medical information affected a substantial right.

2. Workers' Compensation—opinion and award—medical information—privacy concerns—statutory analysis

The Court of Appeals found no federal or state statutory privacy right allowing a worker's compensation claimant to shield from public view medical information contained in an Opinion and Award, which is a public record. Pursuant to N.C.G.S. § 97-92(b), medical records and documents other than Awards are already protected from public disclosure; other statutes cited by plaintiff that protect an individual's health information either did not apply or had express exemptions for worker's compensation or other judicial proceedings.

3. Workers' Compensation—opinion and award—medical information—privacy concerns—constitutional analysis

The Court of Appeals found no constitutional privacy right allowing a worker's compensation claimant to shield from public view medical information contained in an Opinion and Award, which is a public record. Given the importance of maintaining open proceedings in this state's worker's compensation system and the legislature's determination that these documents are public records, plaintiff's privacy interests did not outweigh the public interests at stake, and the Industrial Commission was not required to seal his file.

Appeal by Plaintiff from order entered 22 May 2017 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 5 March 2018.

Law Offices of John M. Kirby, by John M. Kirby for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, L.L.P., by S. Scott Farwell and Bruce A. Hamilton, for defendants-appellees.

MURPHY, Judge.

This case requires that we examine the relationship between a public document entitled an "Opinion and Award" ("Award") and a workers' compensation claimant's privacy interest in the personal medical information relevant to the resolution of his claim. Every year, the North Carolina Industrial Commission enters hundreds of Awards, which are the written records of decision for adjudicated workers' compensation claims. After these Awards are entered, they are uploaded to a publicly accessible and searchable online database.[1] Due to the fact that workers' compensation claims arise from physical injuries suffered at work, the evidentiary findings contained within an Award often directly address a claimant's medical conditions and employment history.

In prior proceedings before the Industrial Commission, Plaintiff unsuccessfully moved to have his entire case file sealed. He complained that due to the Commission's policy to make Awards available to the public online, Plaintiff's personal and medical information (which becomes part of that Award) will be disseminated and his privacy interest in avoiding the disclosure of this information will be compromised. On appeal, Plaintiff argues that he has a privacy interest rooted in statute and the U.S. Constitution, and contends this interest can only be protected by a judicial order that preemptively seals his entire workers' compensation case file, including any future Award entered for his claim. After careful review, we conclude that there is no statutory or constitutional basis that obligates the Industrial Commission to seal Plaintiff's workers' compensation file.

BACKGROUND

On 29 May 2012, Vincent Mastanduno ("Plaintiff"), while employed as a truck driver, slipped and fell on a wet floor while moving a pallet

1. *See Searchable Databases*, N.C. Industrial Commission, http://www.ic.nc.gov/database.html (last accessed 27 August 2018).

during work, injuring his lower back. On 11 September 2012, Plaintiff filed a *Notice of Accident* with the Industrial Commission to obtain workers' compensation benefits. His employer at the time, Defendant National Freight Industries, filed a Form 60 *Employer's Admission of Employee's Right to Compensation* on 19 November 2012 for temporary total compensation in the amount of $740.56 per week. National Freight Industries was covered by a workers' compensation insurance policy through American Zurich Insurance Company (collectively "Defendants").

Several years later on 14 March 2016, Defendants filed a Form 33 with the Industrial Commission requesting that Plaintiff's workers' compensation claim be assigned for a hearing. Defendants alleged that Plaintiff was no longer disabled and refused to cooperate with medical treatment authorized and paid for by Defendants. Plaintiff filed his response, denying that he had not been compliant with Defendant's direction for medical care and further claiming that he remained disabled. On 29 March 2016, the Industrial Commission entered an order permitting Plaintiff's counsel at the time to withdraw. Plaintiff then proceeded pro se. Plaintiff's initial hearing was set for 12 July 2016, and the matter was assigned to Deputy Commissioner Tyler Younts.

On 6 June 2016, prior to Plaintiff's July 2016 evidentiary hearing, Plaintiff moved to have all information regarding his hearing sealed "so that it is not a matter of public record." Deputy Commissioner Younts subsequently entered an order denying Plaintiff's request to seal his file, concluding that "Plaintiff's Workers' Compensation claim file is not a public record[,]" and "to the extent that certain Orders and Awards of the Commission are public records, Plaintiff has provided no factual or legal basis for the relief sought." Plaintiff then requested Deputy Commissioner Younts to reconsider his previous motion and a conference call was held on 24 June 2016. Plaintiff expressed various privacy concerns associated with the potential use of his personal medical information. Deputy Commissioner Younts again denied Plaintiff's request to seal his file, concluding:

> Nevertheless, it remains the case that all injured workers involved in litigation before the Industrial Commission operate under the same privacy rules. Thus, the undersigned finds insufficient basis for the extraordinary relief Plaintiff seeks.

Plaintiff then appealed Deputy Commissioner Younts' denial to the Full Commission. Because the Deputy Commissioner's order was

interlocutory, Plaintiff was required to submit reasons warranting immediate review by the Full Commission. Plaintiff's primary privacy concern is that Awards of the Industrial Commission are made available to the public and immediately placed online, and, therefore, third parties could use personal and medical information included therein to his detriment.[2] Plaintiff also alleged that the denial of his motion to seal infringed on his Ninth and Fourteenth Amendment rights under the U.S. Constitution.

On 10 April 2017, Plaintiff's Motion to Seal was heard by the Full Commission, and on 22 May 2017 the Commission denied Plaintiff's motion. The Full Commission concluded that pursuant to N.C.G.S. § 97-92(b), the Opinions and Awards of the Commission are public records, but the medical records and other evidence upon which an Award would be premised are not. The Commission also concluded that "Plaintiff has offered no evidence or legal argument which would justify his claim being treated differently than that of any other injured worker who is seeking benefits under the Act." Finally, the Full Commission's order correctly recognized that it did not have jurisdiction to rule on Plaintiff's Ninth and Fourteenth Amendment arguments because the Commission does not have jurisdiction to rule on constitutional issues.[3] Plaintiff timely appealed the Full Commission's 22 May 2017 denial of his Motion to Seal.

Represented by counsel on appeal, Plaintiff argues that the Industrial Commission was obligated to seal his entire file upon request because "[p]ursuant to North Carolina statutory law and federal Constitutional law, a person has a right to privacy with respect to his or her medical information."

GROUNDS FOR APPELLATE REVIEW

[1] Plaintiff's appeal is interlocutory as the Full Commission's order does not finally dispose of all issues in the matter. However, "immediate appeal may be taken from an interlocutory order when the challenged order affects a substantial right of the appellant that would be lost

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2. For example, Plaintiff claimed that his record should be sealed because otherwise: (1) his insurance premium rates could increase because he would be considered a greater risk; (2) he could be denied visas for travel to other countries; (3) there is risk that he could be blackmailed; (4) he could be prohibited from adopting a child; (5) he could be prevented from renting an apartment; and (6) the posting of these records could result in cyberbullying, identify theft, and impairment of his ability to obtain lines of credit.

3. *In re Redmond*, 369 N.C. 490, 493, 797 S.E.2d 275, 277 (2017) ("[I]t is a 'well-settled rule that a statute's constitutionality shall be determined by the judiciary, not an administrative board.'").

without immediate review." *France v. France*, 209 N.C. App. 406, 411, 705 S.E.2d 399, 404-05 (2011) (citation and alteration omitted). "No hard and fast rules exist for determining which appeals affect a substantial right. Rather, such decisions usually require consideration of the facts of the particular case." *Estrada v. Jaques*, 70 N.C. App. 627, 640, 321 S.E.2d 240, 249 (1984) (citation omitted).

Plaintiff argues that a substantial right is affected because any Award in this matter will necessarily contain some of Plaintiff's medical information and this information will be made available online at the time the Award is entered. Thus, because the Full Commission has denied his motion to seal on the grounds that there is no legal basis for Plaintiff's requested relief, Plaintiff's privacy rights will be lost absent review by this court. Plaintiff cites several cases in support of his right to appellate review. *See France*, 209 N.C. App. at 411, 705 S.E.2d at 405 ("Absent immediate review, documents that have been ordered sealed will be unsealed, and proceedings will be held open to the public. Because the only manner in which Plaintiff may prevent this from happening is through immediate appellate review, we hold that a substantial right of Plaintiff is affected . . . ."); *Velez v. Dick Keffer Pontiac GMC Truck, Inc.*, 144 N.C. App. 589, 592, 551 S.E.2d 873, 875 (2001) ("While certainly if the Financial Privacy Act was implicated here, it would raise a substantial right . . . .").

For the purpose of determining whether the challenged order affects a substantial right, we need not definitively decide at the outset whether Plaintiff's personal or medical information would fall within the scope of any specific statutory or constitutional privacy protections. Rather, it is sufficient that absent immediate review, some of Plaintiff's personal and medical information will be made available to the public upon entry of a final Award and that some of this information might be subject to statutory and constitutional privacy protections. *See Woods v. Moses Cone Health Sys.*, 198 N.C. App. 120, 124, 678 S.E.2d 787, 791 (2009) (finding the production of documents which might be protected by statute to affect a substantial right). Plaintiff has therefore demonstrated that the order denying his motion to seal by the Full Commission affects a substantial right.

Finally, since the Industrial Commission did not have jurisdiction to pass upon Plaintiff's constitutional privacy claims, it is appropriate for this Court, as the first destination for the dispute in the General Court of Justice, to address these constitutional arguments even though they were not passed upon below. *See Redmond*, 369 N.C at 497, 797 S.E.2d at 280 ("When an appeal lies directly to the Appellate Division from an

administrative tribunal, in the absence of any statutory provision to the contrary a constitutional challenge may be raised for the first time in the Appellate Division as it is the first destination for the dispute in the General Court of Justice.").

ANALYSIS

Plaintiff argues that he has "a Constitutional and statutory right to confidentiality over his private medical information." We initially note that Plaintiff relies heavily on the United States Supreme Court's decision in *Whalen v. Roe*, 429 U.S. 589, 97 S. Ct. 869 (1977), to support his contention that an Award of the Industrial Commission implicates a constitutional "privacy right." However, the U.S. Supreme Court has not explicitly recognized a constitutional *right* to keep one's personal information private. Rather, *Whalen* and its progeny stand for the proposition that there *may* be a "constitutional privacy 'interest in avoiding disclosure of personal matters.' " *See Nat'l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 147, 131 S. Ct. 746, 756 (2011) (citing *Whalen*, 429 U.S. at 599-600, 97 S. Ct. at 876; *Nixon v. Administrator of General Services*, 433 U.S. 425, 457, 97 S. Ct. 2777, 2797 (1977)). With this constitutional backdrop in mind, we first address Plaintiff's claim that he has a statutory right to have his workers' compensation file sealed.

A. Statutory Right to Privacy

[2] An individual's privacy interest in their personal information may be protected by statute. Our Supreme Court has recognized that although the Public Records Act "provides for liberal access to public records," the General Assembly may dictate "that certain documents will not be available to the public." *Virmani v. Presbyterian Health Services Corp.*, 350 N.C. 449, 462, 515 S.E.2d 675, 685 (1999); *see also* N.C.G.S. § 131E-95(b) (2017) ("The proceedings of a medical review committee, the records and materials it produces and the materials it considers shall be confidential and not considered public records within the meaning of G.S. 132-1 . . . ."); N.C.G.S. § 7B-2901(d) (2017) ("The court's entire record of a proceeding involving consent for an abortion of an unemancipated minor . . . is not a matter of public record . . . ."); N.C.G.S. § 132-1.4(a) (2017) ("Records of criminal investigations conducted by public law enforcement agencies . . . are not public records . . . ."). With respect to Workers' Compensation proceedings, the General Assembly has already provided that certain records of the Industrial Commission that are not Awards are not public records:

> The records of the Commission *that are not awards* under G.S. 97-84 and that are not reviews of awards under

> G.S. 97-85, insofar as they refer to accidents, injuries, and settlements are not public records under G.S. 132-1 and shall not be open to the public, but only to the parties satisfying the Commission of their interest in such records and the right to inspect them, and to State and federal agencies pursuant to G.S. 97-81.

N.C.G.S. § 97-92(b) (2017) (emphasis added).

Turning to the instant case, because of N.C.G.S. § 97-92(b), Plaintiff's medical records and any other documents that are not Awards which refer to accidents and injuries are already shielded from public disclosure. Any order to seal these records would be superfluous as they are already, in effect, sealed by statute. With respect to the Awards of the Industrial Commission, the General Assembly has not provided any exemption from the Public Records Act. If we were to adopt Plaintiff's position and instruct the Industrial Commission to seal a yet to be entered Award, then we would contravene the legislative intent expressed in N.C.G.S. § 97-92(b). Specifically, applying the doctrine of *expressio unius est exclusio alterius* to § 97-92(b), we conclude that by expressly listing the subset of records of the Industrial Commission that are exempted from the Public Records Act (i.e. records that are not Awards), the legislature intended that Awards of the Industrial Commission are to be public records. *See Morrison v. Sears, Roebuck & Co.*, 319 N.C. 298, 303, 354 S.E.2d 495, 498 (1987) ("[T]he doctrine of *expressio unius est exclusio alterius* provides that the mention of such specific exceptions implies the exclusion of others.").

Plaintiff also points us to N.C.G.S. §§ 8-53 and 122C-52 to support his position that his private medical information is not a matter of public record. N.C.G.S. § 8-53, which codifies the physician-patient privilege, is a qualified evidentiary privilege that is waivable by the patient, *Adams v. Lovette*, 105 N.C. App. 23, 411 S.E.2d 620 (1992), and must yield in some instances when certain medical information "is necessary to a proper administration of justice." N.C.G.S. § 8-53 (2017). More importantly, the mere existence of the physician-patient privilege has no bearing on whether an Award of the Industrial Commission is a public record or whether the Commission is statutorily obligated to seal any Award that makes reference to a claimant's medical information. Turning to N.C.G.S. § 122C-52, this statute does provide that confidential information acquired in attending or treating a client is not a public record. However, Plaintiff's reliance is inapposite because § 122C-52 only applies to services for the "mentally ill, the developmentally disabled, or substance abusers." N.C.G.S. § 122C-3(14) (2017). Plaintiff

makes no argument addressing how any of these mental health services are relevant to his workers' compensation claim arising from a lower back injury.

Plaintiff next cites a federal statute relevant to health information privacy, the Health Insurance Portability and Accountability Act of 1996 (HIPAA). *See* Health Insurance Portability and Accountability Act of 1996 Pub.L. 104-191, 110 Stat. 1936, (1996). Although a primary goal of HIPAA is to assure that an individual's health information is properly protected from unauthorized disclosure, Plaintiff has failed to recognize that the HIPAA Privacy Rule does not apply to the Industrial Commission because they are not a "covered entity." 45 C.F.R. § 160.103 (2014). Furthermore, HIPAA regulations expressly permit covered entities, such as a patient's doctor, to disclose protected health information to workers' compensation agencies without first obtaining patient authorization. *See* 45 C.F.R. § 164.512 (a) (2016).

In sum, none of the above cited statutory provisions support Plaintiff's position that he possesses a statutory privacy right in his personal medical information that obligates the Industrial Commission to seal his workers' compensation case file on request, including any Award. Pursuant to N.C.G.S. § 97-92(b), Plaintiff's medical records are already exempted from the Public Records Act. Regarding Plaintiff's request to seal any Award entered by the Commission, we again emphasize the General Assembly is the body vested with the authority to determine which kinds of otherwise public records "shall be shielded from public scrutiny." *France*, 209 N.C. App. at 413, 705 S.E.2d at 406. While the General Assembly could have exempted the Awards of the Industrial Commission from the Public Records Act, they did not. "Absent clear statutory exemption or exception, documents falling within the definition of public records in the Public Records Law must be made available for public inspection." *Virmani*, 350 N.C. at 462, 515 S.E.2d at 685 (citation and quotation marks omitted).

B. Constitutional Right to Privacy

[3] Plaintiff also contends "even if the Public Records Act applied to this matter, this act does not trump an individual's Constitutional right to privacy over his or her private health information." As the U.S. Supreme Court did in *Whalen* and *National Aeronautics & Space Administration*, we will assume for present purposes that the Industrial Commission's refusal to seal Plaintiff's case file implicates a privacy interest of constitutional significance. *See Nat'l Aeronautics & Space Admin.*, 562 U.S. at 147, 131 S. Ct. at 756 ("As was our approach in *Whalen*, we will assume for

present purposes that the Government's challenged inquiries implicate a privacy interest of constitutional significance.").

Initially, our review of the Industrial Commission's decision to not preemptively seal Plaintiff's Award must consider the "context" of a workers' compensation proceeding. *See id.* at 148, 131 S. Ct. at 757 ("[J]udicial review of the Government's challenged inquiries must take into account the context in which they arise."). The Workers' Compensation Act was enacted in 1929, and its purpose was not only to offer a swift and certain remedy for an injured worker, but also to ensure a limited and determinate liability for employers. *See* S.L. 1929-120. In 2017, the Industrial Commission had exclusive original jurisdiction over 64,000 filed workers' compensation claims, and approximately 1,800 claims were scheduled for hearings before a Deputy Commissioner. Over 400 of these claims were appealed to the Full Commission.[4] Our assessment of the constitutionality of the challenged publicizing of medical information in an Award must take into account the crucial role the Industrial Commission plays for workers and the State's economy, as well as the sheer magnitude of claims that must be adjudicated in a timely manner.

Next, we must weigh Plaintiff's privacy interests implicated by the public dissemination of an Award against the public interest. *Nixon*, 433 U.S. at 458, 97 S. Ct. at 2798 ("[A]ny intrusion must be weighed against the public interest in subjecting the Presidential materials of appellant's administration to archival screening."); *see also France*, 209 N.C. App. at 417, 705 S.E.2d at 408 (holding plaintiff's claim to be without merit since he "fail[ed] to show that any such right to privacy outweighs the qualified right of the public to open proceedings").

As discussed *supra*, by not exempting the Awards of the Industrial Commission from the Public Records Act, our legislature has determined that these records are of special public interest and are to be made available in their original form. The Industrial Commission's policy of providing web access to final Awards is a reasonable, cost-effective manner of making these records available for public inspection. Furthermore, N.C.G.S. § 97-84 expresses other important public interests at stake:

> The case shall be decided and findings of fact issued based upon the preponderance of the evidence in view of the entire record. The award, together with a statement of

4. North Carolina Industrial Commission, *Fiscal Year 2017 Annual Report*, http://www.ic.nc.gov/2017AnnualReport.pdf (last accessed 27 August 2018).

> the findings of fact, rulings of law, and other matters pertinent to the questions at issue shall be filed with the record of the proceedings . . . .

N.C.G.S. § 97-84 (2017). We recognize that the findings of fact of an award will often include potentially sensitive information that might otherwise be considered private, such as a claimant's identity, a claimant's employment history, a description of the injury suffered at work, and the effects of the injury on the claimant's physical and mental capabilities. However, the inclusion of pertinent and relevant information such as this is necessary because it ensures that workers' compensation claims are resolved impartially with well-reasoned decisions. Not only does this serve the public's interest in government transparency, but, without this information, our ability to conduct effective appellate review would be significantly impaired. *See Wilkes v. City of Greenville*, 369 N.C. 730, 746, 799 S.E.2d 838, 849 (2017) ("[T]he Commission must make specific findings that address the 'crucial questions of fact upon which plaintiff's right to compensation depends.' ").

Regarding Plaintiff's asserted privacy interests, we are not unsympathetic to his concerns regarding the disclosure and potential use of personal information contained in an Award. To illustrate his concerns, Plaintiff submitted a publicly available final Opinion and Award from another workers' compensation claim.[5] Plaintiff directs our attention to certain findings of this Award which went beyond the details of the worker's accident, indicating that the worker experienced episodes of crying, panic attacks, and was diagnosed with Post-Traumatic Stress Disorder (PTSD). Sensitive as these topics may be, Plaintiff wholly overlooks the crucial role this personal medical information had in the Commission's resolution of the claim. Specifically, crying and panic attacks were some of the symptoms the claimant presented to her treating physicians after the workplace accident. Furthermore, based on these symptoms, the claimant's psychiatrist ultimately diagnosed her with PTSD, and this evidence supported the Commission's conclusion that the claimant's PTSD was a compensable injury.

Plaintiff nevertheless argues, "It is inconceivable that a 'proper administration of justice' would require the Commission (which is not a court, and thus not subject to open courts provisions) to disseminate the Plaintiff's protected, private health information to the entire world via the Internet." This argument fails to grasp the role of an Award in

5. I.C. NO. 307020.

our Workers' Compensation system. The Industrial Commission does not make its Awards available online merely because it is necessary for the proper administration of justice, but a claimant's Award is made publicly available because this document is, as a matter of law, an official public record.

Plaintiff's constitutional privacy argument also overlooks critical distinctions between the facts of his case and those present in *Whalen*. In *Whalen*, a New York statute that required physicians to identify patients obtaining certain prescription drugs having potential for abuse was challenged as violating the plaintiff's privacy rights. *Whalen*, 429 U.S. at 592, 97 S. Ct. at 873. Doctors were required to disclose the name, age, and address of the patients for which they prescribed Schedule II drugs and this information was stored in a government office building. *Id*. The *Whalen* plaintiffs argued that patient-identification requirements created a risk of public disclosure and impaired their interests in avoiding disclosure of personal matters and "making important decisions independently." *Id*. at 599, 97 S. Ct. at 877 "After evaluating the security issues regarding the patient-identification requirements of the statute, the Supreme Court upheld the statute, stating that the statute 'does not, on its face, pose a sufficiently grievous threat to either interest to establish a constitutional violation.' " *ACT-UP Triangle v. Comm'n for Health Servs. of the State of N.C.*, 345 N.C. 699, 710, 483 S.E.2d 388, 394 (1997) (citing *Whalen*, 429 U.S. at 600, 97 S. Ct. at 877).

The most obvious distinction between *Whalen* and the instant case is that the personal medical information at issue in *Whalen* was not directly at issue in an active legal dispute. Unlike the plaintiff-patients in *Whalen*, the Plaintiff here is a workers' compensation claimant who alleges that he is entitled to disability compensation as a result of a workplace accident. Because Plaintiff seeks compensation based on his injury, his privacy interest in avoiding the disclosure of medical information relevant to this claim is lessened, if not waived, due to his status as a party in the present action.

Plaintiff also avers that the statutory scheme in *Whalen* was upheld because of the security measures taken by the government to protect the patient's information. *See Whalen*, 429 U.S. at 607, 97 S. Ct. at 880 (Brennan concurring) ("In this case, as the Court's opinion makes clear, the State's carefully designed program includes numerous safeguards intended to forestall the danger of indiscriminate disclosure."); *see also ACT-UP Triangle*, 345 N.C. at 712, 483 S.E.2d at 396 ("We conclude that the statutory security provisions are adequate to protect against potential unlawful disclosure which might otherwise render the confidential HIV

testing program constitutionally infirm."). We agree with Plaintiff that the presence of "safeguards" were considered by cases such as *Whalen* and *ACT-UP Triangle*. However, subsequent U.S. Supreme Court decisions have clarified that *Whalen* does not stand for the proposition "that an ironclad disclosure bar is needed to satisfy privacy interests that may be 'rooted in the Constitution.' " *Nat'l Aeronautics & Space Admin.*, 562 U.S. at 157, 131 S. Ct. at 762 (alterations omitted) (citing *Whalen*, 429 U.S. at 605, 97 S. Ct. 869).

To the extent that *Whalen* is applicable here, we note that there are "safeguards" in place which mitigate against the risk of unwarranted and indiscriminate disclosure of Plaintiff's personal information. N.C.G.S. § 97-92 already exempts Plaintiff's medical records from the Public Records Act, and the risk of any unwarranted disclosure of these records is very low. While an Award will invariably contain some personal medical information, N.C.G.S § 97-84 provides that the Awards of the Industrial Commission are only allowed to include information "pertinent to the questions at issue." Thus, this statute guides the pen of the Commissioners and mitigates against the risk that non-pertinent personal information will be indiscriminately included in an Award.

In light of the critical role that the Opinion and Award plays in our State's workers' compensation system and our General Assembly's determination that these documents are public records, we conclude that Plaintiff's asserted privacy interests do not outweigh the public interests at stake here. Accordingly, we conclude that the Industrial Commission is not obligated to seal Plaintiff's workers' compensation file, including any Award, due to any constitutional privacy interest.

CONCLUSION

Plaintiff has no statutory or constitutional right to have his entire workers' compensation case file, including any Award, sealed. Accordingly, the order of the Industrial Commission denying Plaintiff's Motion to Seal is affirmed, and the case is remanded for further proceedings consistent with this opinion.

AFFIRMED.

Chief Judge McGEE and Judge CALABRIA concur.

STATE OF NORTH CAROLINA
v.
CORY DION BENNETT, DEFENDANT

No. COA17-1027

Filed 16 October 2018

1. Jury—selection—race-based peremptory challenge—race of juror—subjective impression

In a prosecution for methamphetamine-related charges, defendant was not entitled to *Batson* relief upon his allegation that the prosecutor improperly dismissed two African-American prospective jurors solely on the basis of race. The trial court's finding that three out of five African-American prospective jurors were passed by the State and remained on the jury panel was accepted by the State, and was an indication that the prospective jurors' race was clear to the court, precluding the need to make further inquiry into the prospective jurors' race for the record.

2. Drugs—jury instruction—acting in concert—reasonable inference

In a prosecution for methamphetamine-related charges, the trial court properly instructed the jury on an acting in concert theory based on sufficient evidence that the woman arrested with defendant at his home where ingredients and paraphernalia associated with methamphetamine production were found was involved in a common plan or scheme to make methamphetamine with him.

Judge BERGER concurring with separate opinion.

Appeal by defendant from judgments entered on or about 16 March 2017 by Judge John E. Nobles, Jr. in Superior Court, Sampson County. Heard in the Court of Appeals 2 April 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Brent D. Kiziah, for the State.

Franklin E. Wells, Jr., for defendant-appellant.

STROUD, Judge.

Defendant appeals from convictions for several drug-related offenses. Defendant's *Batson* argument regarding jurors stricken by the

State fails because he failed to make a *prima facie* case that the State's challenges were racially motivated. The trial court's jury instruction on acting in concert was supported by the evidence. We conclude there was no error in defendant's trial.

I. Background

On 4 December 2015, law enforcement officers responded to a complaint about drug activity at a mobile home where defendant and his girlfriend, Ms. Smith,[1] had been living for about two months. Their landlord met the officers at the residence and knocked on the door. Ms. Smith opened the door to the home and officers immediately smelled a chemical odor associated with making methamphetamine. During their initial pat-down of defendant, they found a methamphetamine pipe and a receipt from IGA, dated 4 December 2015, for crystal lye. During their initial sweep of the home when they arrested defendant and Ms. Smith, the officers found items used in making methamphetamine including pliers, rubber gloves, measuring devices, lithium batteries, lye, and aluminum foil; they also found drug paraphernalia including a methamphetamine pipe, chemicals used to make methamphetamine, and Sudafed pills. When he was standing outside the residence, Sudafed pills began falling out of defendant's pants.[2] The officers got a search warrant, and, during the search of the mobile home under the warrant, they found much more drug paraphernalia and many other items associated with methamphetamine production throughout the home. Defendant was tried by a jury and convicted of five counts of possession of methamphetamine precursor, one count of manufacturing methamphetamine, and two counts of trafficking in methamphetamine. Defendant timely appeals his convictions to this Court.

II. Jury Selection

[1] Defendant first contends that "[t]he trial judge erred in his handling of [d]efendant's *Batson* motion because there was *prima facie* evidence that the prosecutor's use of peremptory strikes was racially motivated." (Original in all caps).

"The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 26 of the North Carolina Constitution prohibit race-based peremptory challenges during

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1. We will use a pseudonym to protect the privacy of this witness.

2. Defendant later told the officers the bags of pills had fallen into his pants when he was sitting on the couch because he wears his pants low.

jury selection." *State v. Taylor*, 362 N.C. 514, 527, 669 S.E.2d 239, 253–54 (2008). Moreover,

> [t]he clear error standard is a federal standard of review adopted by our courts for appellate review of the *Batson* inquiry.
>
> In *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed.2d 69 (1986), *modified*, *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L.Ed.2d 411 (1991), the United States Supreme Court established a three-step test to determine whether the State's peremptory challenges of prospective jurors are purposefully discriminatory. Under *Batson*, the defendant must first successfully establish a *prima facie* case of purposeful discrimination. If the *prima facie* case is not established, it follows that the peremptory challenges are allowed. If the *prima facie* case is established, however, the burden shifts to the prosecutor to offer a race-neutral explanation for each peremptory challenge at issue. If the prosecutor fails to rebut the *prima facie* case of racial discrimination with race-neutral explanations, it follows that the peremptory challenges are not allowed. Finally, the trial court must determine whether the defendant has proven purposeful discrimination.
>
> If the prosecutor volunteers his reasons for the peremptory challenges in question before the trial court rules whether the defendant has made a *prima facie* showing or if the trial court requires the prosecutor to give his reasons without ruling on the question of a *prima facie* showing, the question of whether the defendant has made a *prima facie* showing becomes moot, and it becomes the responsibility of the trial court to make appropriate findings on whether the stated reasons are a credible, nondiscriminatory basis for the challenges or simply pretext.

State v. Wright, 189 N.C. App. 346, 351, 658 S.E.2d 60, 63-64 (2008) (citations and quotation marks omitted).

> In reviewing this determination, we are mindful that trial courts, given their experience in supervising *voir dire* and their ability to observe the prosecutor's questions and demeanor firsthand, are well qualified to decide if the circumstances concerning the prosecutor's use of

> peremptory challenges creates a prima facie case of discrimination. The trial court's findings will be upheld on appeal unless they are clearly erroneous-that is, unless on the entire evidence we are left with the definite and firm conviction that a mistake has been committed.

Taylor, 362 N.C. at 527-28, 669 S.E.2d at 254 (citations, quotation marks, and brackets omitted).

To establish a *prima facie* case of "purposeful discrimination," a defendant must show that the State used peremptory challenges to remove jurors on the basis of race. Review of the denial of a *Batson* challenge is highly fact specific, and cannot be reduced to simple formula:

> In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. *Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose*. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against . . . jurors [of a certain race].

Batson v. Kentucky, 476 U.S. 79, 96-97, 106 S. Ct. 1712, 1723, 90 L. Ed. 2d 69, 88 (1986); *see also State v. Smith*, 328 N.C. 99, 120-21, 400 S.E.2d 712, 724 (1991) ("We have also considered questions and statements made by the prosecutor during voir dire examination and in exercising his peremptories which may either lend support to or refute an inference of discrimination. . . . We have concluded that the discrimination in a case need not be pervasive, as even a single act of invidious discrimination may form the basis for an equal protection violation." (Citations, quotation marks, and brackets omitted)). Because of the fact specific nature of any *Batson* challenge, the Supreme Court "decline[d] . . . to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." *Batson*, 476 U.S. at 99, 106 S. Ct. at 1724-25, 90 L. Ed. 2d at 89-90.

The record must contain evidence sufficient to conduct a review of the defendant's specific argument on appeal. *See State v. Brogden*, 329

N.C. 534, 546, 407 S.E.2d 158, 166 (1991). Depending on the specific argument of the defendant, the evidence required for appellate review may include record evidence of the race of certain or all members of the jury pool. For proper review of denial of a *Batson* challenge, it is necessary that the record establishes the race of any prospective juror that the defendant contends was unconstitutionally excused for discriminatory purpose by peremptory challenge. Our Supreme Court has addressed this issue:

> If a defendant in cases such as this believes a prospective juror to be of a particular race, *he can bring this fact to the trial court's attention and ensure that it is made a part of the record*. Further, *if there is any question as to the prospective juror's race*, this issue should be resolved by the trial court based upon questioning of the juror *or other proper evidence*[.]

State v. Mitchell, 321 N.C. 650, 656, 365 S.E.2d 554, 557 (1988) (emphasis added).[3] If there is *not* any question about a prospective juror's race, neither the defendant nor the trial court is required to make inquiry regarding that prospective juror's race:

> The race of one of the peremptorily challenged jurors was not clearly discernible to the attorneys in this case or to the judge. The court found as fact that this prospective juror was either black or Indian. Our Supreme Court has as to the prospective juror's race, this issue should be resolved by the trial court based upon questioning of the juror or other proper evidence. *State v. Mitchell*, 321 N.C. 650, 656, 365 S.E.2d 554, 557 (1988). In this case no inquiry was made and the question was left unanswered. Defendant has therefore failed to present a sufficient record on appeal to include this prospective juror in the category of black prospective jurors peremptorily challenged.

State v. Robinson, 97 N.C. App. 597, 601, 389 S.E.2d 417, 420 (1990) (emphasis added).

We do not believe that the Supreme Court cases cited by the concurring opinion stand for the principle that the *only* method a trial court may use to support a finding concerning the race of a prospective juror

3. We note that our Supreme Court did not dismiss the defendant's *Batson* argument in *Mitchell*, it considered then "overruled" the defendant's *Batson* argument. *Mitchell*, 321 N.C. at 656, 365 S.E.2d at 557-58.

is to ask that juror (and, apparently, just accept the juror's racial self-identification). As the concurring opinion apparently recognizes by citing *Brogden*, all our Supreme Court requires is "proper evidence [of] the race of each juror[.]" *Brogden*, 329 N.C. at 546, 407 S.E.2d at 166. Certainly, not all African-Americans can be readily identified as such based upon outward appearances. That is why our Supreme Court rejected a scheme whereby the races of prospective jurors could be established for the record based upon notations of an attorney or a court reporter's "subjective impressions." *Id*. When the race of a prospective juror is not obvious, a person's subjective impressions may well be erroneous.

The concurring opinion conflates the role attorneys and other court personnel play in the process with the role of the trial court:

> Subjective impressions of a juror's race made by a court reporter, clerk, or trial counsel are all insufficient to establish an adequate record on appeal. *It follows then that the subjective impressions of a juror's race made by the parties or trial court judge would also be insufficient to establish a proper record of the juror's races on appeal.*

(Citations omitted) (emphasis added).

We agree that the subjective impressions of the race of a prospective juror made by "the parties" is not relevant. However, "[t]he trial court has broad discretion in overseeing *voir dire*[.]" *State v. Campbell*, 359 N.C. 644, 666, 617 S.E.2d 1, 15 (2005). In jury *voir dire* the trial court is charged with making legal determinations based upon its factual findings.

> "To allow for appellate review, the trial court must make specific findings of fact at each stage of the *Batson* inquiry that it reaches." This Court "*must uphold the trial court's findings unless they are 'clearly erroneous*.' " Under this standard, the fact finder's choice between two permissible views of the evidence "cannot" be considered clearly erroneous. We reverse "only" when, after reviewing the entire record, we are "left with the definite and firm conviction that a mistake has been committed."

State v. Headen, 206 N.C. App. 109, 114–15, 697 S.E.2d 407, 412 (2010) (emphasis added) (citations and brackets omitted). "Where the record is silent upon a particular point, it will be presumed that the trial court acted correctly in performing his judicial acts and duties." *State v. Fennell*, 307 N.C. 258, 262, 297 S.E.2d 393, 396 (1982). This presumption

of correctness applies to findings made by the trial court. *State v. James*, 321 N.C. 676, 686, 365 S.E.2d 579, 585 (1988).

Further, the *judge's* subjective impressions are not only relevant, but an integral part of the judge's duties: "Upon review, the trial court's determination [whether to excuse a prospective juror] is given great deference because it is based primarily on evaluations of credibility. Such determinations will be upheld as long as the decision is not clearly erroneous." *State v. Fair*, 354 N.C. 131, 140, 557 S.E.2d 500, 509–10 (2001) (citations omitted). Further:

> [I]t is the trial court that "is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision, in the first instance, as to whether or not a constitutional violation of some kind has occurred."

State v. Salinas, 366 N.C. 119, 124, 729 S.E.2d 63, 67 (2012) (citation omitted).

We disagree with the concurring opinion's conclusion that findings of fact made by the trial court should be given no more weight than "[s]ubjective impressions of a juror's race made by a court reporter, clerk, or trial counsel . . . ." We also disavow any suggestion that our holding would permit the trial court to make a finding of fact about a prospective juror's race "by accepting an interested party's or counsel's untested perceptions as fact." We simply hold that if the trial court determines that it can reliably infer the race of a prospective juror based upon its observations during *voir dire*, and it thereafter makes a finding of fact based upon its observations, a defendant's burden of preserving that prospective juror's race for the record has been met. Absent evidence to the contrary, it will be presumed that the trial court acted properly – i.e. that the evidence of the prospective juror's race was sufficient to support the trial court's finding in that regard. *Fennell*, 307 N.C. at 262, 297 S.E.2d at 396. If the State disagrees with the finding of the trial court, it should challenge the finding at trial and seek to introduce evidence supporting its position. Questioning the juror at that point could be warranted. Here, however, the State clearly agreed with the trial court's findings related to the race of the five identified prospective jurors. Absent any evidence that the trial court's findings were erroneous, "we must assume that the trial court's findings of fact were supported by substantial competent evidence." *State v. James*, 321 N.C. 676, 686, 365 S.E.2d 579, 585 (1988).

Nothing in the appellate opinions of this State require the trial court to engage in needless inquiry if a prospective juror's race is "clearly discernable" without further inquiry. Here, the record demonstrates that it was "clearly discernable" to the trial court, and the attorneys for the State and Defendant, that five of the 21 prospective jurors questioned on *voir dire* were African-American, and that two prospective jurors were excused pursuant to peremptory challenges by the State. The following discussion and ruling occurred on defendant's *Batson* motion:

> MS. BELL: Judge, I do have a Batson motion. And, Judge, the basis of my motion goes to the fact that in Seat Numbers 10, we had two jurors, [Mr. Jones] and [Ms. Taylor], both of whom were black jurors, and both of whom were excused. And, Judge, in the State's voir dire of both jurors, there was no overwhelming evidence, there was nothing about any prior criminal convictions, any feelings about -- towards or against law enforcement, there's no basis, other than the fact that those two jurors happen to be of African-American decent [sic] they were excused.[4]
>
> We heard from Mr. [Jones] who stated that he was a supervisor here in Clinton and had a breaking and entering two and a half years ago. Nobody was charged, but he had no feelings towards law enforcement, no negative experience with the DA's office. And, with Ms. [Taylor], we heard that she owned a beauty salon that was next to ABC Insurance. She didn't know anyone in the audience or anyone in the case. There was nothing that was deduced during the jury voir dire that would suggest otherwise.
>
> THE COURT: Mr. Thigpen?
>
> MR. THIGPEN: Judge, I don't think Ms. Bell's made a prima facie showing discriminatory intent, which is required under Batson. The simple fact that both jurors happen to have been African-American and I chose to excuse them peremptorily, is not sufficient to raise a Batson challenge.
>
> THE COURT: Seems to me that you excused two, but kept three African-Americans. Am I right?

4. We have used pseudonyms to protect the privacy of jurors.

> MR. THIGPEN: Yes, sir, that's right; including Mr. [Anderson], who is Juror Number 5, who is an African-American male; Ms. [Robins], Juror Number 9, who is an African-American female; and Juror Number 7, Ms. [Moore], an African-American female.
>
> THE COURT: All right. I don't see where you've overcome or made a prima facie showing of lack of neutrality.
>
> . . . .
>
> THE COURT: Okay. Who was it you excused?
>
> MR. THIGPEN: I excused [Mr. Jones] and [Ms. Taylor] who had been both seated in Seat Number 10.
>
> . . . .
>
> MS. BELL: . . . . I'm making my case that I have made a prima facie showing, that there was no other reason [for excusing the two African-American prospective jurors], other than that of race[.]
>
> THE COURT: All right. I'm going to deny your motion. Madam Clerk, the Court, from the evidence, the arguments of counsel on the record, the Court finds there is no evidence of a showing of prejudice based on race or any of the contentions in *Batson*, GS 912A, GS 15A-958. *The Court further finds that out of the five jurors who were African-American, three still remain on the panel and have been passed by the State*. The Court concludes there is no prima facie showing justifying the Batson challenge; therefore, the defendant's motion is denied.

(Emphasis added).

Reading the trial court's ruling in context, it seems apparent that the fact that the prospective jurors in question were African-American was clear to the trial court. It is only "if there is any question as to the prospective juror's race [that] this issue should be resolved by the trial court based upon questioning of the juror or other proper evidence." *Mitchell*, 321 N.C. at 656, 365 S.E.2d at 557. The trial court made a finding that five African-Americans had been questioned on *voir dire*, that three made it onto the jury, and that the other two were excused pursuant to the State's use of peremptory challenges.

However, the State contends that defendant has failed to properly preserve this argument for appeal. Assuming, *arguendo*, that defendant's argument is properly before us, we find no error in the ruling of the trial court and affirm. *See State v. Willis*, 332 N.C. 151, 162, 420 S.E.2d 158, 162 (1992) ("Assuming it was error to sustain the objections to this testimony by defendant Willis and that it was error for the court to hold that it could not find Willis was a member of a cognizable minority, we cannot hold this was prejudicial error.").

III. Jury Instruction

[2] Last, defendant contends that the trial court erred in instructing the jury over his objection on acting in concert "when the evidence failed to support an inference that . . . [defendant] and [Ms. Smith] were acting together in the commission of any crime." (Original in all caps).

> The standard of review for appeals regarding jury instructions to which a defendant has properly requested at trial is the following: This Court reviews jury instructions contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury. If a party requests a jury instruction which is a correct statement of the law and which is supported by the evidence, the trial judge must give the instruction at least in substance.

State v. Cornell, 222 N.C. App. 184, 190-91, 729 S.E.2d 703, 708 (2012) (citation, quotation marks, ellipses, and brackets omitted). "In order to support a jury instruction on acting in concert, the State must prove that the defendant is present at the scene of the crime and acts together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citation and quotation marks omitted).

Ms. Smith was also charged with various crimes and entered into a plea agreement with the State to testify against defendant. The State elected not to call her to testify at defendant's trial, but defendant called her to testify.

Defendant argues that

> The jury should have been told that the state's burden was to prove that [defendant] accomplished each crime on his own. Instead, the judge told jurors they could convict [defendant] if they found that he alone or he acting in concert with [Ms. Smith] had committed the crimes. Because there was no evidence to support the suggestion that Ms. [Smith] was involved, [defendant] is entitled to a new trial.

Defendant claims that Ms. Smith's testimony "corroborated [defendant's] statement: she said the two of them had returned to the house shortly before law enforcement arrived with the landlord. When she and [defendant] returned to the home, they found the glass was broken in the back door."

Defendant argues that the evidence merely shows that Ms. Smith was "present" at the mobile home and

> [a] person's mere presence is not enough to establish acting in concert. "A defendant's mere presence at the scene of the crime does not make him guilty [...] even if he sympathizes with the criminal act and does nothing to prevent it." *State v. Capps*, 77 N.C. App. 400, 402-03, 335 S.E.2d 189, 190 (1985). The state is required to prove a common purpose, plan, or scheme *State v. Forney*, 310 N.C. 126, 134, 310 S.E.2d 20, 25 (1984), and in this case Ms. [Smith] denied any such plan or purpose.

Ms. Smith did deny she was involved in a plan to make methamphetamine with defendant, but the jury did not have to believe her. *See*, *e.g.*, *State v. Green*, 296 N.C. 183, 188, 250 S.E.2d 197, 200-01 (1978) ("The credibility of a witness's identification testimony is a matter for the jury's determination, and only in rare instances will credibility be a matter for the court's determination." (Citation omitted)). There was abundant evidence showing she was far more than "merely present" at the home during methamphetamine production. We do not understand defendant's argument that "there was no evidence to support the suggestion that [Ms. Smith] was involved" in the crimes charged. She testified she pled guilty to possession of methamphetamine precursor chemical and attempted trafficking for methamphetamine by possession. She also testified that on 4 December 2015, before their arrest and the search of the mobile home, she and defendant went to Walmart to purchase Sudafed and to IGA. The receipt from IGA -- which showed that crystal lye was purchased -- was found in defendant's pocket when he was arrested

and was admitted as evidence. Sudafed and crystal lye are two primary ingredients used to make methamphetamine. They then went back to defendant's home, where Ms. Smith testified they had previously made methamphetamine. Ms. Smith had been living in the home with defendant for about two months, and officers found methamphetamine ingredients, paraphernalia, and items used to produce methamphetamine in plain view throughout the home in nearly every room -- bedroom, living room, bathroom, laundry room, and kitchen. Contrary to defendant's argument, all of the evidence, including Ms. Smith's testimony, tends to show that she was very much involved in making methamphetamine with defendant, despite her denial of any "plan." This evidence is more than sufficient to support an acting in concert instruction. We hold that the trial court did not err in giving the instruction.

IV. Conclusion

We conclude there was no error in defendant's trial.

NO ERROR.

Chief Judge McGEE concurs.

Judge BERGER concurs with separate opinion.

BERGER, Judge, concurring in separate opinion.

I concur in the result reached by the majority. However, I would find that Defendant has waived review of his *Batson* challenge because he failed to preserve an adequate record setting forth the race of the jurors. Our Supreme Court has stated that findings as to the race of jurors may not be established by the subjective impressions or perceptions of "the defendant, *the court*, [ ] counsel" or other court personnel. *State v. Mitchell*, 321 N.C. 650, 656, 365 S.E.2d 554, 557 (1988). (emphasis added.) Because fact finding by guesswork or intuition is inappropriate, I disagree with the majority's conclusion that a trial court's subjective impressions concerning race are sufficient evidence to establish an adequate record on appeal.

Other than speculative statements by counsel and the trial court, there is nothing in the record that demonstrates, as the majority suggests, that it was " 'clearly discernable' to the trial court, and the attorneys for the State and Defendant, that five of the 21 prospective jurors questioned on *voir dire* were African-American." Further inquiry should

be required by a defendant alleging purposeful racial discrimination in jury selection to establish an adequate record for appellate review.

"An individual's race is not always easily discernable." *Mitchell*, 321 N.C. at 655, 365 S.E.2d at 557. When a defendant "believes a prospective juror to be of a particular race, he can bring this fact to the trial court's attention and ensure that it is made a part of the record." *Id.* at 656, 365 S.E.2d at 557. That was not done here.

In *State v. Mitchell*, our Supreme Court held that the defendant had "failed to present an adequate record on appeal from which to determine whether jurors were improperly excused by peremptory challenges on the basis of race." *Id.* at 655, 365 S.E.2d at 557. In so holding, the Court in *Mitchell* reasoned that

> the burden is on a criminal defendant who alleges racial discrimination in the selection of the jury to establish an inference of purposeful discrimination. The defendant must provide the appellate court with an adequate record from which to determine whether jurors were improperly excused by peremptory challenges at trial. Statements of counsel alone are insufficient to support a finding of discriminatory use of peremptory challenges. . . .
>
> [Here,] the defendant filed a motion to require the court reporter to note the race of every potential juror examined, which was also denied. Although this approach *might* have preserved a proper record from which an appellate court could determine if any potential jurors were challenged solely on the basis of race, we find it inappropriate. To have a court reporter note the race of every potential juror examined would require a reporter alone to make that determination without the benefit of questioning by counsel or any other evidence that might tend to establish the prospective juror's race. *The court reporter, however, is in no better position to determine the race of each prospective juror than the defendant, the court, or counsel.* . . . As the trial court noted, "The clerk might note the race as being one race and in fact that person is another race. My observation has been you can look at some people and you cannot really tell what race they are." The approach suggested by the defendant would denigrate the task of preventing peremptory challenges of jurors on the basis of race to the reporter's subjective impressions as to what race they spring from.

> If a defendant in cases such as this believes a prospective juror to be of a particular race, he can bring this fact to the trial court's attention and ensure that it is made a part of the record. Further, if there is any question as to the prospective juror's race, this issue should be resolved by the trial court based upon questioning of the juror or other proper evidence, as opposed to leaving the issue to the court reporter who may not make counsel aware of the doubt. In the present case the defendant did not avail himself of this opportunity, despite the trial court's suggestion at the pre-trial hearing that he might wish to do so during jury selection. . . . For whatever reason, counsel chose not to make any such inquiry at trial. Thus, the defendant has failed to demonstrate that the prosecutor exercised peremptory challenges solely to remove members of any particular race from the jury.

Id. at 654-56, 365 S.E.2d at 556-58 (1988) (*purgandum*[1]) (emphasis added).

The majority here relies almost exclusively on *Mitchell* to support its proposition that "[i]f there is *not* any question about a prospective juror's race, neither the defendant nor the trial court is required to make inquiry regarding the prospective juror's race." Based solely on *Mitchell*, further inquiry regarding each juror's race may not always be necessary when a defendant can somehow demonstrate that each juror's race was "clearly discernable." However, since *Mitchell*, our Supreme Court has effectively held that further inquiry regarding each juror's race is required because perceptions and subjective impressions—standing alone—are insufficient to establish jurors' races.

In *State v. Payne*, our Supreme Court similarly held that "we need not reach the constitutional issues presented by this assignment of error, as we are not presented with a record on appeal which will support the defendant's argument that jurors were improperly excused by peremptory challenges exercised solely on the basis of race." *State v. Payne*, 327 N.C. 194, 198, 394 S.E.2d 158, 160 (1990). The relevant facts in *Payne* were as follows:

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1. Our shortening of the Latin phrase "*Lex purgandum est.*" This phrase, which roughly translates "that which is superfluous must be removed from the law," was used by Dr. Martin Luther during the Heidelberg Disputation on April 26, 1518 in which Dr. Luther elaborated on his theology of sovereign grace. Here, we use *purgandum* to simply mean that there has been the removal of superfluous items, such as quotation marks, ellipses, brackets, citations, and the like, for ease of reading.

> the defendant (who is white) objected to the State's use of peremptory challenges against black jurors. The defendant requested that the courtroom clerk record the race and sex of the "prospective" jurors who had already been seated or excused, but the trial court denied his request. The next morning, the defendant renewed his objection via a written motion for the clerk to record the race and sex of jurors. The motion was supported by an affidavit, subscribed by one of the defendant's attorneys, purporting to contain the name of each black prospective juror examined to that point, and whether the State had peremptorily excused, challenged for cause, or passed the prospective juror to the defense (the defendant says one black juror did sit on the trial jury). The trial court, viewing the affidavit's allegations as true, nonetheless ruled that the defendant had failed to make a prima facie showing of a substantial likelihood that the State was using its peremptory challenges to discriminate against black jurors.

Id. at 198, 394 S.E.2d at 159-60.

Our Supreme Court agreed with the trial court's assessment

> that had the defendant made his motion prior to jury selection, the court would have had each prospective juror state his or her race during the court's initial questioning. This would have provided the trial court with an accurate basis for ruling on the defendant's motion, and would also have preserved an adequate record for appellate review. Having not made his motion to record the race of prospective jurors until after the twelve jurors who actually decided his case had been selected, the defendant attempted to support his motion via an affidavit purporting to provide the names of the black prospective jurors who had been examined to that point. That affidavit, however, contained only the perceptions of one of the defendant's lawyers concerning the races of those excused—perceptions no more adequate than the court reporter's or the clerk's would have been, as we recognized in *Mitchell*. For the reasons stated in *Mitchell*, we conclude that the trial court did not err by denying the defendant's motion for the clerk to record the race of "prospective jurors" after they had been excused and the jury had been selected. For similar reasons, we also conclude that the record before

> us on appeal will not support the defendant's assignment of error.

Id. at 200, 394 S.E.2d at 160-61 (citations omitted).

In *State v. Brogden*, our Supreme Court also held that the defendant "failed to provide an adequate record regarding the race of the jurors, both those accepted and those rejected, and has therefore waived any such objection." *State v. Brogden*, 329 N.C. 534, 545, 407 S.E.2d 158, 165 (1991). Our Supreme Court reasoned that the "defendant, *in failing to elicit from the jurors by means of questioning or other proper evidence the race of each juror*, has failed to carry his burden of establishing an adequate record for appellate review." *Id.* at 546, 407 S.E.2d at 166 (emphasis added). This holding was based on the fact that "the only records of the potential jurors' race preserved for appellate review are the subjective impressions of defendant's counsel and notations made by the court reporter of her subjective impressions." *Id.*

Although our Supreme Court appeared to limit the need for further inquiry to instances when the jurors' races were not "easily discernible" in *Mitchell*, 321 N.C. at 655, 365 S.E.2d at 557, subsequent cases have required defendants to provide "proper evidence [of] the race of each juror," *Brogden*, 329 N.C. at 546, 407 S.E.2d at 166, to establish an adequate record for appellate review. Subjective impressions of a juror's race made by a court reporter, clerk, or trial counsel are all insufficient to establish an adequate record on appeal. *See Mitchell*, 321 N.C. at 655-56, 365 S.E.2d at 557 (holding that a court reporter or court clerk's identification of each juror's race as insufficient); *Payne*, 327 N.C. at 200, 394 S.E.2d at 161 (identifying an affidavit that "contained only the perceptions of one of the defendant's lawyers concerning the races of those excused" as inadequate); *Brogden*, 329 N.C. at 546, 407 S.E.2d at 166 (reaffirming that the "subjective impressions of defendant's counsel and notations made by the court reporter of her subjective impressions" of the jurors' races are insufficient). It follows then that the subjective impressions of a juror's race made by the trial court would also be insufficient to establish a proper record of a juror's race on appeal. *See State v. Mitchell*, 321 N.C. at 656, 365 S.E.2d at 557 ("The court reporter, however, is in no better position to determine the race of each prospective juror than the defendant, *the court*, or counsel.") (emphasis added).

The majority states that the record here "demonstrates that it was 'clearly discernable' to the trial court, and the attorneys for the State and Defendant, that five of the 21 prospective jurors questioned on *voir dire* were African-American." However, the record contains no

evidence regarding the race of any juror or prospective juror. Not a single juror was ever asked his or her race by Defendant or the trial court. Rather, the record merely contains statements by counsel and the trial court concerning their perceptions and subjective impressions of the prospective jurors' races. This is not enough. We cannot and should not rely on the trial court's and defense counsel's perceptions of the jurors to simply conclude that the jurors' races were "clearly discernible." In the absence of any "proper evidence [of] the race of each juror," *Brogden*, 329 N.C. at 546, 407 S.E.2d at 166, I would find that Defendant has failed to provide a record on appeal sufficient to permit this Court to review his *Batson* claim.

The majority's assertion that a trial court's subjective impressions concerning race equates with a credibility determination misses the mark. The majority would essentially allow judges to take judicial notice of an individual juror's race simply by looking at him or her. It seems unusual that judges have acquired this unique skill which is absent in court reporters, clerks, and lawyers. As our Supreme Court held in *Mitchell*, trial courts are in no better position than court personnel, lawyers, or the parties to determine a juror's race based solely on subjective impressions and perceptions.

Where a party accuses opposing counsel of purposeful racial discrimination in jury selection, that party should take appropriate steps to elicit evidence establishing the race of jurors or prospective jurors. Without proper evidence set forth in the record on appeal, this Court should decline to accept subjective impressions of race as fact.

STATE OF NORTH CAROLINA
v.
CRAIG DEONTE HAIRSTON, DEFENDANT

No. COA17-1357

Filed 16 October 2018

1. Appeal and Error—preservation of issues—objection outside jury's presence—failure to object in jury's presence

Defendant in a first-degree murder trial failed to preserve appellate review of testimony regarding a prior shooting incident where defendant objected to the proffered testimony outside the jury's presence but failed to object again when the testimony was actually introduced in the jury's presence.

2. Appeal and Error—invited error—testimony elicited by defendant—request for plain error review

A defendant convicted of first-degree murder was not entitled to plain error review of the admission of expert ballistics testimony where defendant invited the alleged error by eliciting the complained-of statement on cross-examination.

Appeal by Defendant from Judgments entered 14 August 2017 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 6 June 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly N. Callahan, for the State.

Marilyn G. Ozer for Defendant.

INMAN, Judge.

Defendant Craig Deonte Hairston ("Defendant") appeals from two judgments following a jury verdict finding him guilty of conspiring to commit robbery with a firearm and first-degree murder under the felony murder rule. He argues that he is entitled to a new trial because the trial court erred in admitting testimony about Defendant's use of a firearm in a prior incident and because the trial court erred in permitting a ballistics expert to give an unqualified opinion linking spent shell casings to a single firearm allegedly possessed by Defendant. Because Defendant failed to timely object to the testimony regarding the prior incident and

invited the expert opinion testimony he asserts was introduced in error, we hold that Defendant has failed to preserve review of these arguments and dismiss his appeal.

I. FACTUAL AND PROCEDURAL HISTORY

The evidence at trial tended to show the following:

On 28 August 2014, Defendant travelled from Virginia to Greensboro, North Carolina to visit a friend, Montray Price ("Price"), at his apartment. Defendant and Price were drinking beer and smoking on the apartment's balcony when, apropos of nothing, they resolved to head into a nearby patch of woods and shoot guns. Defendant, carrying a .45 caliber pistol, and Price, carrying a .32 caliber firearm, walked from the apartment to the complex's parking lot, where they decided to simply fire their guns into the air rather than walk all the way to the woods. Defendant and Price fired their guns and left the parking lot without picking up the spent shell casings. A tenant in the complex found the shell casings later that day and called the Greensboro Police Department. The responding officer collected the .45 and .32 casings and logged them into evidence.

A few days later, on 1 September 2014, Defendant again drove down from Virginia to Price's apartment. There, Defendant met with Price and a third man, Colby Watkins ("Watkins"), and spent the afternoon smoking marijuana and drinking. Their conversation eventually turned to the topic of making money, and the three decided to use Defendant's and Price's guns to rob a drug dealer. They ultimately abandoned that plan and returned to drinking and smoking well into the evening. Later that night, Price received a text message from a prostitute, Jessica London ("London"). He asked if she had any drugs, and she replied that she did; Defendant, Price, and Watson thereafter left the apartment to meet with London at a nearby Holiday Inn.

The three men arrived at the Holiday Inn after midnight on 2 September 2014, and London joined them in their car to smoke marijuana. The group drove to a gas station, where Price and Watson went inside while Defendant and London stayed in the car. Inside the gas station, Watson told Price that he wanted to rob London, to which Price said no, reasoning that London likely did not keep any money on her person. Watson and Price returned to Defendant and London in the car, and the four drove back to the Holiday Inn.

Back at the hotel, Price and London went inside to have sex after she called and informed her pimp. Price rejoined Watson and Defendant in the car some time later, and the three drove away from the Holiday

Inn. As they were leaving; however, Watson saw London's pimp drive by, and the group agreed to rob him.

Watson, Price, and Defendant drove to Price's apartment, retrieved their guns, and parked their car at a Waffle House near the Holiday Inn to plan the robbery. Defendant and Price then walked to the hotel and donned masks while Watson stayed in the car. The pair approached an occupied silver car in the Holiday Inn parking lot and demanded money from the driver, Kevin Millner ("Millner")—a man who was not, in fact, London's pimp or related to her in any way whatsoever. Millner screamed, and a shot rang out. Price and Defendant fled the scene on foot.

After sun-up on 2 September 2014, a maintenance man at the Holiday Inn found a spent .45 caliber shell casing in the hotel parking lot near Millner's car, pocketing it to dispose of later. Sometime thereafter, the maintenance man noticed Millner in his vehicle with the windows closed, believing he was asleep. The assistant general manager of the hotel, at the maintenance man's suggestion, decided to check on Millner due to the unseasonably hot weather. When the assistant general manager approached the vehicle, he realized that Millner was dead and called the police. Law enforcement officers arrived on the scene a short time later; the maintenance worker gave them the shell he had found earlier in the day.

Defendant was indicted on 29 September 2014 on one count of first-degree murder and one count of conspiracy to commit robbery with a dangerous weapon. On the morning of the third day of trial, the State planned to call Price as a witness. However, before the jury was called back in and trial resumed, Defendant's counsel raised an objection to Price's testimony, stating:

> While the jury's out, I would like to impose—I think Mr. Montray Price will be the State's witness. The State, during his testimony, may—or will be introducing evidence of some uncharged conduct.
>
> We would pose an objection to the introduction of some shots being fired at [Price]'s apartment by my client as being uncharged conduct, and that it's not relevant to these proceedings under Rule 404 and 403.
>
> But even if it was deemed relevant by the Court, its prejudicial nature outweighs any probative value.

The trial court then heard from the State on Defendant's objection and allowed the State to proffer Price's testimony during *voir dire*, complete

with direct and cross-examination by both parties. At the conclusion of Price's *voir dire* testimony, the trial judge recessed court for 30 minutes, retired to his chambers, and considered the matter. Once court resumed, the trial judge asked a question of Price and subsequently overruled Defendant's objection. Defendant requested a limiting instruction, which was allowed. The jury returned to the courtroom and the trial resumed. Price testified before the jury concerning the events of 28 August and 2 September 2014. Defendant's trial counsel did not object at that time.

The State also called as a witness Karen Weimorts ("Weimorts"), a firearms and tool mark examiner with the Greensboro Police Department, who provided expert testimony concerning the .45 caliber shells found on 28 August 2014 in the parking lot outside Price's apartment and on 2 September 2014 in the Holiday Inn parking lot. On direct examination, Weimorts testified that "the .45 casing from the homicide was fired in the same firearm as the .45 casings from the scene [outside Price's apartment] on August 28th." On cross-examination, Defendant's counsel eliminated any uncertainty in Weimorts's testimony by engaging in the following exchange:

> [Defendant's Counsel]: Is it your opinion that those [matching firing pin marks on the .45 casings] were made by one gun out of all of the .45-caliber pistols that are manufactured and sold in the U.S.?
>
> [Weimorts]: Yes.

At no point did Defendant's counsel object to Weimorts's testimony.

Following the presentation of evidence and arguments of counsel, the jury found Defendant guilty of feloniously conspiring to commit robbery with a firearm and first-degree murder under the felony murder rule. Defendant was sentenced to a minimum of 33 months and maximum of 52 months imprisonment for conspiracy and life imprisonment without parole for murder. He gave notice of appeal in open court.

II. ANALYSIS

Defendant presents two arguments on appeal, asserting that the trial court: (1) committed prejudicial error in admitting Price's testimony concerning the events of 28 August 2014; and (2) committed plain error in admitting Weimorts's unqualified testimony linking the two sets of .45 shell casings to a single firearm. Our review of the record, transcript, and case law, however, discloses that Defendant has failed to preserve either issue for review. As a result, we dismiss Defendant's appeal.

A. Price's Testimony

[1] Rule 10 of the North Carolina Rules of Appellate Procedure establishes that "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion . . . ." N.C. R. App. P. 10(a)(1) (2018). In construing this language, our Supreme Court has held that "[t]o be timely, an objection to the admission of evidence must be made 'at the time it is actually introduced at trial.' " *State v. Ray*, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010) (quoting *State v. Thibodeaux*, 352 N.C. 570, 581, 532 S.E.2d 797, 806 (2000) (emphasis omitted)). "It is insufficient to object only to the presenting party's forecast of the evidence." *Ray*, 364 N.C. at 277, 697 S.E.2d at 322 (citing *Thibodeaux*, 352 N.C. at 581, 532 S.E.2d at 806). Thus, "[a]n objection made 'only during a hearing out of the jury's presence prior to the actual introduction of the testimony' is insufficient." *State v. Snead*, 368 N.C. 811, 816, 783 S.E.2d 733, 737 (2016) (quoting *Ray*, 364 N.C. at 277, 697 S.E.2d at 322) (citations omitted).

Our Supreme Court's decision in *Snead* controls our review of Defendant's argument regarding testimony about the prior shooting incident. In *Snead*, the defendant objected to the introduction of lay witness opinion testimony while the jury was outside the courtroom. 368 N.C. at 813, 783 S.E.2d at 735. The trial court allowed a *voir dire* examination of the witness outside the presence of the jury following the objection, and ruled that the witness could provide the opinion testimony at issue. *Id.* at 813, 783 S.E.2d at 736. The jury was called back in, and the witness gave his opinion testimony without objection from the defendant. *Id.* at 813-14, 783 S.E.2d at 736. On review to this Court, we held that the trial court abused its discretion in admitting the opinion testimony and vacated the defendant's conviction. *State v. Snead*, 239 N.C. App. 439, 768 S.E.2d 344 (2015). On discretionary review, our Supreme Court reversed our decision, holding that the defendant had failed to preserve the issue for appeal:

> Here defendant objected to [the opinion] testimony . . . only outside the presence of the jury. He did not subsequently object when the State elicited [that] testimony before the jury. Therefore, defendant failed to preserve the alleged error for appellate review, and "the Court of Appeals erred by reaching the merits of defendant's arguments on this issue."

Snead, 368 N.C. at 816, 783 S.E.2d at 738 (quoting *Ray*, 364 N.C. at 278, 697 S.E.2d at 322).

Defendant's challenge to Price's testimony on appeal proceeds upon almost precisely the same series of events present in *Snead*. As recounted *supra*, Defendant's counsel objected to Price's testimony outside the presence of the jury and before Price had been sworn in as a witness. The trial court allowed Defendant and the State to conduct a *voir dire* examination of Price and subsequently overruled Defendant's objection. The jury was called back to the courtroom, and Price testified before the jury without objection from Defendant's counsel. On these facts, and following *Snead*, we hold Defendant failed to preserve review of Price's testimony under Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure and dismiss this portion of his appeal.

We note that the trial court considered Defendant's objection to Price's testimony to be "timely" when it was raised outside the presence of the jury. But Defendant did not timely object to the testimony when it was elicited before the jury.

In *State v. Williams*, ___ N.C. App. ___, 801 S.E.2d 169 (2017), *reversed in part*, 370 N.C. 526, 809 S.E.2d 581 (2018), this Court held in a split decision that a defendant had preserved an evidentiary ruling despite his counsel's failure to object at the time the evidence was introduced before the jury because, "[b]ased on the exchange between defense counsel and the trial court following *voir dire*, it [was] understandable that counsel [did] not feel compelled to renew his objection in the presence of the jury." ___ N.C. App. at ___, 801 S.E.2d at 174. Holding that the defendant had failed to preserve the issue, the majority reasoned, would therefore be "fundamentally unfair[;]" as a result, we reviewed the issue on appeal. *Id.* at ___, 801 S.E.2d at 174. Judge Dillon dissented based on *Snead* and *Ray*, writing that while he "under[stood] the majority's [unfairness] argument[,]" he would nonetheless hold the issue unpreserved for prejudicial error review, because "we are compelled to follow holdings from our Supreme Court." *Williams*, ___ N.C. App. at ___, 801 S.E.2d at 178 (Dillon, J., dissenting). Ultimately, our Supreme Court reversed in part this Court's decision in *Williams* "for the reasons stated in the dissenting opinion." *Williams*, 370 N.C. at 526, 809 S.E.2d at 581.

Consistent with our Supreme Court's decision in *Williams*, Defendant's counsel had the burden of lodging a timely objection to Price's testimony when it was elicited before the jury—the trial judge's conduct and Defendant's counsel's subjective understanding thereof notwithstanding—and his failure to do so precludes appellate review for prejudicial error. Because Defendant does not request plain error review of this issue, we dismiss this portion of his appeal.

B. Weimorts's Testimony

[2] Defendant asserts that the trial court committed plain error in allowing Weimorts's testimony, arguing that unqualified tool mark identification is too unreliable to comply with the admissibility requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993).[1] Defendant relies entirely on decisions from other state and federal jurisdictions for this contention. We do not reach the issue, however, because as argued by the State, Defendant invited the error of which he complains. We therefore dismiss his argument.

At the outset of this analysis, we note that Defendant does not contend that firearm identification through tool mark analysis is *per se* inadmissible under *Daubert*; rather, he contends that "*unqualified* scientific opinions are precluded." (emphasis added). Examining the trial transcript, however, reveals that the Defendant elicited Weimorts's unqualified opinion—the only portion of her testimony Defendant argues constitutes error. As recounted *supra*, the State elicited Weimorts's opinion "[t]hat the .45 casing from the homicide was fired in the same firearm as the .45 casings from the scene [outside Price's apartment] on August 28th." At no point in the State's questioning did Weimorts state any particular degree of certainty, posit that her finding was absolutely conclusive, claim that her opinion was free from error, or expressly discount the possibility that the .45 casings could have been fired from different guns. That testimony came, instead, on cross-examination when Defendant's counsel asked "[i]s it your opinion that those [matching tool marks on the .45 casings] were made by one gun out of all of the .45-caliber pistols that are manufactured and sold in the U.S.[,]" to which Weimorts replied, "Yes." Defendant has therefore requested plain error review of language he himself introduced into the record. "Statements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law." *State v. Gobal*, 186 N.C. App. 308, 319, 651 S.E.2d 279, 287 (2007) (citations omitted). "[A] defendant who invites error . . . waive[s] his right to all appellate review concerning the invited error, including plain error review[,]" *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001), and, having done so here, Defendant's appeal for plain error review of Weimorts's testimony is dismissed.

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1. This State has adopted the *Daubert* standard applicable to expert testimony as recognized in *State v. McGrady*, 368 N.C. 880, 787 S.E.2d 1 (2016).

III. CONCLUSION

For the foregoing reasons, we hold that Defendant failed to preserve review of the trial court's admission of Price's testimony. We further hold that the Defendant invited the plain error asserted in Weimorts's testimony. As a result, we dismiss Defendant's appeal in its entirety.

DISMISSED.

Judges DILLON and DAVIS concur.

STATE OF NORTH CAROLINA
v.
DENZEL JAMAL HILL, DEFENDANT

No. COA18-107

Filed 16 October 2018

1. Indictment and Information—sufficiency—description of offense—omission of word—assault

An indictment was sufficient to charge defendant with assault with a deadly weapon inflicting serious injury even though it omitted the word "assault" from the description of the offense ("defendant . . . did E.D. with a screwdriver, a deadly weapon") because the indictment, viewed as a whole, substantially followed the language of the statute and apprised defendant of the charged crime—it correctly listed the offense as "AWDW SERIOUS INJURY" and referenced the correct statute.

2. Indictment and Information—amendments—substantial alteration of charge—underlying crime

The trial court erred by allowing the State to amend an indictment for second-degree kidnapping by changing the underlying crime from "assault inflicting serious injury" (a misdemeanor) to "assault inflicting serious *bodily* injury" (a felony). This substantial alteration required the judgment to be vacated and remanded for resentencing on the lesser-included crime of false imprisonment.

3. Rape—sufficiency of evidence—number of counts

The evidence was sufficient to support defendant's conviction for 33 counts of statutory rape where the victim testified that

defendant had sexual intercourse with her at least once per week for 71 weeks.

4. Criminal Law—jury instructions—incorrect instruction—definition of serious bodily injury

The trial court did not plainly err by incorrectly stating in a jury instruction on assault inflicting serious bodily injury that the State's burden could be satisfied by the defendant causing a substantial risk of serious permanent disfigurement. Given the evidence that the victim actually suffered serious permanent disfigurement, it was not reasonably probable that the outcome would have been different but for the error.

5. Appeal and Error—preservation of issues—failure to object—cruel and unusual punishment

Defendant failed to preserve for appellate review his argument that his consecutive sentences totaling 138 years violated his constitutional right to be free from cruel and unusual punishment where he failed to lodge an objection before the trial court.

Appeal by Defendant from judgments entered 2 May 2017 by Judge James Gregory Bell in Brunswick County Superior Court. Heard in the Court of Appeals 19 September 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sonya M. Calloway-Durham, for the State.

Richard Croutharmel for the Defendant.

DILLON, Judge.

Denzel Jamal Hill ("Defendant") appeals from six judgments finding him guilty of one count of first degree sex offense, five counts of statutory rape, and two counts of second degree kidnapping. On appeal, Defendant argues: (A) the indictment for assault with a deadly weapon was facially deficient and the indictment for assault inflicting serious injury was wrongfully amended; (B) the State's evidence was not sufficient to support the fifty-two (52) counts of statutory rape, sexual offenses and indecent liberties charges on which Defendant was indicted; (C) the court erroneously defined "serious bodily injury" during its jury instructions; and (D) the court's sentencing violates the Eighth Amendment of the United States Constitution by being grossly disproportionate to the crimes for which Defendant was convicted. We

find that the trial court did err in allowing the State to amend the second degree kidnapping indictment in 14CRS053569. We find no error as to all other alleged issues.

I. Background

Defendant was indicted for various crimes in connection with a series of sex encounters with two minors, E.D. and F.H. A jury found the Defendant guilty of sixty-nine (69) counts, which the trial court consolidated into six judgments. Defendant was sentenced to consecutive terms of imprisonment. Defendant timely appealed.

II. Analysis

A. Challenges to Certain Indictments

An indictment purported to be invalid on its face may be challenged at any time. *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000). We review the sufficiency of an indictment *de novo*. *See State v. Sturdivant*, 304 N.C. 293, 307-11, 283 S.E.2d 719, 729-31 (1981).

Defendant takes issue with two of the indictments.

1. Assault Indictment (14CRS053566)

[1] First, Defendant argues that the indictment for one of the "assault with a deadly weapon inflicting serious injury" charges (14CRS053566) is defective because the indictment fails to include the word "assault" in its description of the offense.

It is not fatal if an indictment is not perfect with regard to form or grammar if the meaning of the indictment is clearly apparent "so that a person of common understanding may know what is intended." *State v. Coker*, 312 N.C. 432, 435, 323 S.E.2d 343, 346 (1984).

Here, while the indictment does fail to include the word "assault," the indictment was sufficient in charging an assault by alleging that Defendant willfully injured one of the victims with a screwdriver, stating as follows:

> [T]he jurors for the State upon their oath present that on or about the date(s) of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did E.D. with a screwdriver, a deadly weapon, inflicting serious injury, against the form of the statute in such case made and provided and against the peace and dignity of the State.

Additionally, the indictment correctly lists the offense as "AWDW SERIOUS INJURY" and references the correct statute, namely, N.C. Gen. Stat. § 14-32(B). N.C. Gen. Stat. § 14-32 (2013) (describing felonious assault with deadly weapon inflicting serious injury). Viewing the indictment as a whole, it substantially follows the language of N.C. Gen. Stat. § 14-32 and its essential elements, and apprised Defendant of the crime in question. Therefore, we conclude it meets the requirements of law. *State v. Randolph*, 228 N.C. 228, 231, 45 S.E.2d 132, 134 (1947).

2. Kidnapping Indictment (14CRS043569)

[2] Defendant also contends that the trial court erred in allowing the State to amend the indictment of second degree kidnapping in 14CRS053569. We agree.

Pursuant to N.C. Gen. Stat. § 15A-923(e) (2013), a bill of indictment may not be amended. This statute has been interpreted to mean "that an indictment may not be amended in a way which 'would substantially alter the charge set forth in the indictment.' " *State v. Brinson*, 337 N.C. 764, 767, 448 S.E.2d 822, 824 (1994). "In determining whether an amendment is a substantial alteration, we must consider the multiple purposes served by indictments, the primary one being to enable the accused to prepare for trial." *State v. Silas*, 360 N.C. 377, 380, 627 S.E.2d 604, 606 (2006) (internal citations omitted).

One is guilty of kidnapping if he or she confines, restrains, or removes the victim for one of six purposes enumerated in N.C. Gen. Stat. § 14-39. The statutory purpose relevant to this case is where the confinement, restraint, or removal of the victim is for "[f]acilitating the commission of any felony[.]" N.C. Gen. Stat. § 14-39(a)(2) (2013).

Our Supreme Court has held that an indictment for kidnapping based on the commission of a felony need not specify the felony. *State v. Freeman*, 314 N.C. 432, 435-36, 333 S.E.2d 743, 745-46 (1985). Our Supreme Court has also held that if the indictment does specify a crime, Defendant "must be convicted, if convicted at all," on the felony specified in the indictment. *State v. Faircloth*, 297 N.C. 100, 107-10, 253 S.E.2d 890, 894-96 (1979). Thus, if the indictment does state a specific underlying felony, a jury may not convict on the basis of a different felony than the one included in the indictment. *State v. Moore*, 315 N.C. 738, 743, 340 S.E.2d 401, 404 (1986).

Here, the indictment in question alleges that Defendant restrained the victim for the purpose of facilitating the following felony: "Assault Inflicting Serious Injury." However, "assault inflicting serious injury" is

a Class A1 misdemeanor. N.C. Gen. Stat. § 14-33(c) (2013). During trial, though, the State was allowed to amend its indictment to add the term "bodily" such that the crime specified was "assault inflicting serious *bodily* injury," which is a Class F felony. N.C. Gen. Stat. § 14-32.4 (2013).

We hold that the State was bound by the crime as alleged in the original indictment. As noted above, pursuant to N.C. Gen. Stat. § 15A-923(e), a bill of indictment may not be amended "in a way which would substantially alter the charge set forth in the indictment." *Brinson*, 337 N.C. at 767, 448 S.E.2d at 824 (internal citation omitted). As we have held, an amendment from "assault inflicting serious injury" to "assault inflicting serious bodily injury" does constitute a substantial change as it raises the underlying crime from a misdemeanor to a felony. *See State v. Moses*, 154 N.C. App. 332, 338, 572 S.E.2d 223, 228 (2002). Thus, the trial court erred in allowing the amendment and sending the charge of second degree kidnapping to the jury.

Nevertheless, the allegations in the indictment do constitute the crime of false imprisonment, a lesser-included offense of kidnapping. *State v. Harrison*, 169 N.C. App. 257, 265-66, 610 S.E.2d 407, 414 (2005), *aff'd per curiam*, 360 N.C. 394 (2006). In *Harrison*, we stated that:

> The difference between kidnapping and the lesser-included offense of false imprisonment is the purpose of the confinement, restraint, or removal of another person. If the purpose of the restraint was to accomplish one of the purposes enumerated in N.C. Gen. Stat. § 14-39, then the offense is kidnapping. However, if the unlawful restraint occurs without any of the purposes specified in the statute, the offense is false imprisonment.

Id. Further, the jury did find that Defendant committed the acts as alleged in the indictment. *State v. Piggott*, 331 N.C. 199, 210-11, 415 S.E.2d 555, 562 (1992). Therefore, we vacate the judgment finding Defendant guilty of second degree kidnapping and remand for judgment and resentencing for the lesser-included crime of false imprisonment.

B. Motion to Dismiss based on Insufficient Evidence

[3] Defendant next alleges that the trial court erred in denying his motion to dismiss the thirty-three (33) counts of statutory rape, two counts of statutory sex offense, and seventeen (17) counts of indecent liberties as to F.H. Defendant based his motion to dismiss on the ground that there was insufficient evidence put on by the State to prove all of these counts.

In order to overcome the Defendant's motion to dismiss, the State must have sufficiently provided evidence of each essential element of the statutory rape charge(s), the statutory sexual offense charge(s), and the indecent liberties charge(s). The elements of both statutory rape and statutory sexual offense are "engag[ing] in vaginal intercourse with another person who is 15 years of age or younger and the defendant is at least 12 years old and at least six years older than the person, except when the defendant is lawfully married to the person." N.C. Gen. Stat. § 14-27.7a (2013) (recodified as N.C. Gen. Stat. § 14-27.25 (2015)). The elements of taking indecent liberties with a child are, where one "being 16 years of age or more and at least five years older than the child in question . . . willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire[.]" N.C. Gen. Stat. § 14-202.1 (2013).

During the trial, the State provided evidence in the form of testimony from victim F.H. F.H. testified that she was born on 4 December 1998 and that she was in a relationship with Defendant from 1 March 2013 through 18 July 2014, at which time she was fourteen (14) and fifteen (15) years old and Defendant was at least twenty-one (21) years old. F.H. further testified to sexual contact during their relationship; F.H. stated that she and Defendant had vaginal intercourse at least once a week, beginning the day that F.H. met Defendant, and that she performed oral sex before, during, and after each occurrence of sexual intercourse. Two additional witnesses testified to observing Defendant and F.H. have sexual intercourse during this time, one of whom also testified to observing oral sex between Defendant and F.H.

Defendant argues that since the State failed to provide a specific number of times that F.H. and Defendant had sexual intercourse and oral sex and how many times Defendant touched F.H. in an immoral way, the total number of counts is not supported and his motion to dismiss should have been granted. We disagree.

While F.H. did not explicitly state a specific number of times that she and Defendant had sexual relations, we conclude that a reasonable jury could find the evidence, viewed in the light most favorable to the State, sufficient to support an inference for the number of counts at issue. As the State points out in its brief, F.H. testified that she and Defendant had sexual intercourse at least once a week for a span of seventy-one (71) weeks. This testimony amounts to at least seventy-one (71) incidents of sexual intercourse, and Defendant was only indicted and convicted of thirty-three (33) incidents. Our Supreme Court has held that

> if the evidence show[s] a greater number of incidents committed by the defendant than the number of offenses with which he was charged and convicted, no jury unanimity problem existed regarding the convictions because, 'while one juror might have found some incidents of misconduct and another juror might have found different incidents of misconduct, the jury as a whole found that improper sexual conduct occurred.

State v. Massey, 361 N.C. 406, 408, 646 S.E.2d 362, 364 (2007) (internal citation omitted). We conclude that the trial court was correct in denying Defendant's motion to dismiss.

C. Jury Instruction of "Serious Bodily Injury"

[4] Defendant next appeals the jury instructions that the trial court gave for the charge of assault inflicting serious bodily injury as to E.D. Specifically, Defendant takes issue with the definition of "serious bodily injury."

Defendant did not object to the jury instruction at the time it was given; therefore, we review the instruction for plain error. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "Under the plain error rule, [a] defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

While this court prefers the use of the North Carolina Pattern Jury Instructions, an instruction is sufficient if it adequately explains each essential element of an offense. *State v. Avery*, 315 N.C. 1, 31, 337 S.E.2d 786, 803 (1985). Jury instructions are generally upheld where "it is highly unlikely that omission of [the incorrect] portion of the charge would have produced a different result in the trial." *State v. Gaines*, 283 N.C. 33, 42, 194 S.E.2d 839, 846 (1973). In *State v. Jones*, the North Carolina Supreme Court held that, "[w]here the charge as a whole presents the law fairly and clearly to the jury, the fact that isolated expressions, standing alone, might be considered erroneous affords no grounds for a reversal." 294 N.C. 642, 653, 243 S.E.2d 118, 125 (1978).

The North Carolina Pattern Jury Instruction provides that "[s]erious bodily injury is bodily injury that creates or causes [a substantial risk of death][serious permanent disfigurement]." N.C. P. I. 120.11. Here, the trial court's instruction stated, in pertinent part:

> Serious bodily injury is injury that creates or causes a substantial risk of serious permanent disfigurement.

While the trial court's instruction was imperfect as to its definition of serious bodily injury, we are not convinced that the jury was misled by the instructions as given. The instruction, viewed as a whole, correctly placed the burden of proof on the State for the two elements of felonious assault inflicting serious bodily injury. The trial court merely conjoined the language of two parentheticals from the pattern jury instruction. Moreover, the evidence put on by the State goes to prove the creation of serious permanent disfigurement, not a risk of serious substantial disfigurement. Therefore, even though the jury was incorrectly instructed that the State's burden may be satisfied by the Defendant causing a substantial risk of serious permanent disfigurement, the State's evidence sufficiently proved that E.D. actually suffered serious permanent disfigurement. We cannot say that it is reasonably probable that the outcome would have been different, but for the error in the jury instruction.

D. Eighth Amendment Violation

[5] Lastly, Defendant argues that the trial court's consecutive sentences, totaling a minimum of one hundred thirty-eight (138) years, violates his constitutional right to be free from cruel and unusual punishment under the Eighth Amendment. Defendant failed to object to the sentencing on constitutional grounds in the trial court. Therefore, Defendant has failed to preserve this argument for appellate review. *See State v. Wilson*, 363 N.C. 478, 484, 681 S.E.2d 325, 330 (2009).

In any event, we note that Defendant's constitutional argument appears to lack merit. Article I, Section 27 of the North Carolina Constitution mirrors the Eighth Amendment of the federal constitution in that it protects individuals from "cruel or unusual punishments." A punishment may be "cruel or unusual" if it is not proportionate to the crime for which the defendant has been convicted. *State v. Ysaguire*, 309 N.C. 780, 786, 309 S.E.2d 436, 440 (1983). Our Supreme Court in *Ysaguire* stated that "only in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment's proscription of cruel and unusual punishment." *Id.* at 786, 309 S.E.2d at 441.

N.C. Gen. Stat. § 15A-1354 vests the trial court with the discretion to elect between concurrent or consecutive sentences for a defendant faced with multiple sentences of imprisonment. *Id.* at 785, 309 S.E.2d at 440. "The imposition of consecutive sentences, standing alone, does not constitute cruel and unusual punishment." *Id.*, at 786, 309 S.E.2d at 441.

Here, the trial court utilized the discretion given to it by the legislature and consolidated the seventy (70) verdicts into six identical judgments, each of which were sentenced in the presumptive range. The trial court ordered that these two hundred seventy-six-month (276-month) sentences be served consecutively. In light of the crimes committed in this case, there appears to be no abuse of discretion in the sentencing.

III. Conclusion

We vacate the judgment of guilty of second degree kidnapping in 14CRS053569 and remand the case back to the trial court for an entry of judgment of conviction and sentencing for false imprisonment. We find no other error.

NO ERROR IN PART, VACATED AND REMANDED IN PART.

Judges ELMORE and DAVIS concur.

STATE OF NORTH CAROLINA
v.
ANFERNEE D. KNIGHT, DEFENDANT

No. COA18-10

Filed 16 October 2018

1. Criminal Law—joinder—transactional connection—gang-related shootings

The trial court did not abuse its discretion by declining to sever multiple offenses, arising from two gang-related shootings, that had been consolidated for trial. There was sufficient transactional connection between the offenses because they arose from a continuous course of violent criminal conduct related to gang rivalries, they occurred on the same day, the same pistol was used, and some witnesses were present at both shootings. Further, severance is not required where a defendant argues he would have elected to testify regarding one offense but not others.

2. Appeal and Error—waiver—specific grounds for objection

Defendant waived appellate review of his argument that the trial court's refusal to sever offenses that had been consolidated for trial, arising from two gang-related shootings, prevented a fair trial because it allowed the jury to hear testimony regarding

defendant's gang ties and evidence of a seven-year-old's murder. Defendant's failure to state this specific ground for objecting to the ruling at trial constituted waiver.

3. Criminal Law—jury instructions—deviation from agreed-upon pattern jury instructions—error—harmless

Although the trial court erred by deviating from the agreed-upon pattern jury instructions regarding reliance on hearsay statements, defendant failed to demonstrate prejudicial error where the trial court had given the instruction six times throughout trial and where the record reflected overwhelming evidence of defendant's guilt.

4. Jury—dismissal—failure to follow instructions—different responses to same question

The trial court did not abuse its discretion by dismissing an impaneled juror in defendant's murder trial where a bailiff reported that the juror had expressed an opinion that the district attorney had behaved rudely, the juror gave a different response to the same question during two separate hearings regarding his statement to the bailiff, and the juror ignored the trial court's instructions.

Appeal by defendant of judgments entered 23 May 2017 by Judge Walter H. Godwin, Jr., in Wilson County Superior Court. Heard in the Court of Appeals 23 August 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Peter A. Regulski, for the State.

Sarah Holladay for defendant.

BERGER, Judge.

On May 23, 2017, Anfernee D. Knight ("Defendant") was convicted of first-degree murder; assault with a deadly weapon with intent to kill inflicting serious injury; attempted first-degree murder; and two counts of discharging a weapon into an occupied dwelling. Defendant argues that the trial court erred in: (1) denying Defendant's motion for severance; (2) failing to instruct the jury regarding the jury's use of hearsay statements; and (3) dismissing an impaneled juror. We disagree.

Factual and Procedural Background

This appeal arose from two gang-related shootings on July 23, 2014. The first shooting occurred around 4:30 p.m. near National Grocery in

Wilson ("the National Grocery shooting"). Defendant was sitting in a parked car with Donnell Hill ("Hill"), Demetrius Spells ("Spells"), and Demonte Briggs ("Briggs"). Defendant, Hill, and Spells were members of a local gang. Antonio Pate ("Pate"), a rival gang member, drove past Defendant's parked car and opened fire. According to the testimony of Hill, Spells, and Briggs, Defendant returned fire and struck Pate in his right shoulder as he fled the scene. Defendant, Hills, Spells, and Briggs left the scene without calling the police. Police later recovered six .45-caliber shell casings and eight 9-mm shell casings from the National Grocery shooting scene.

In retaliation for the National Grocery shooting, Defendant and other members of his gang opened fire on a group associated with Pate's gang later that evening at Starmount Circle, an apartment complex ("the Starmount Circle shooting"). In preparing to retaliate, Defendant and Spells borrowed Spell's girlfriend's green Honda, which was described as very loud. Spells drove and Defendant sat in the back seat, still armed with the 9-mm pistol used in the earlier National Grocery shooting. After picking up Hill, the three men met several others associated with their gang at a local convenience store. After a group discussion, the group split up—three men left in a silver Maxima while Hill, Spells, and Defendant drove away in the loud green Honda. The convenience store's video surveillance recorded the meeting, which was played for the jury.

Around 9:30 p.m., several witnesses at Starmount Circle observed a dark car with a loud muffler and a silver car approach the apartment complex. Shortly thereafter, gunshots were heard. Seven-year-old Kamari Antonio Jones ("Jones") was killed when a bullet from the exchange struck him while he was in bed.

At trial, Spells testified that Defendant exited the green Honda when they arrived at Starmount Circle armed with the 9-mm pistol that he used earlier that day. Defendant met two other men from the silver Maxima; and the three men walked between the homes near Starmount Circle. While they were gone, Spells heard gunshots. When Defendant returned to the green Honda, he did not have the 9-mm pistol. Spells drove them away.

Police later recovered three .45-caliber shell casings and four 9-mm shell casings from the Starmount Circle scene. Testing confirmed the 9-mm shell casings recovered from the National Grocery shooting were fired from the same pistol as the 9-mm used in the Starmount Circle shootings. Defendant's DNA profile also matched the DNA profile obtained from a cigarette located near the Starmount Circle crime scene.

On May 23, 2017, a Wilson County jury found Defendant guilty of one count of first-degree murder; four counts of attempted first-degree murder; three counts of assault with a deadly weapon with intent to kill; one count of assault with a deadly weapon with intent to kill inflicting serious injury; and two counts of discharging a firearm into an occupied dwelling. Defendant was sentenced to life imprisonment without parole for first-degree murder and consecutive sentences of 157 to 201 months for attempted first-degree murder, 73 to 100 months for assault with a deadly weapon with intent to kill inflicting serious injury, and 64 to 89 months each for two counts of discharging a weapon into an occupied dwelling. Judgment was arrested on the remaining counts, which served as the felonies underlying Defendant's first-degree felony murder conviction. Defendant timely appeals, challenging the trial court's denial of his motion to sever, failure to instruct the jury regarding their limited use of hearsay statements, and dismissal of an impaneled juror.

Analysis

I. Severance

[1] Defendant first alleges the trial court erred by denying his motion to sever the National Grocery case from the Starmount Circle case. Defendant asserts that severance was necessary to protect Defendant's constitutional right to testify in his own defense and to prevent the introduction of certain evidence that was relevant to some, but not all charges. We disagree.

"It is well established that a trial court's ruling on the consolidation or severance of cases is discretionary and will not be disturbed absent a showing of abuse of discretion." *State v. Shipp*, 155 N.C. App. 294, 305, 573 S.E.2d 721, 728 (2002) (citation omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Consolidation of offenses for trial is appropriate "when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." N.C. Gen. Stat. § 15A-926(a) (2017). Our courts generally favor consolidation of offenses for trial because it "expedites the administration of justice, reduces the congestion of trial dockets, conserves judicial time, lessens the burden upon citizens who must sacrifice both time and money to serve upon juries, and avoids the necessity of recalling witnesses who would otherwise be called upon to testify only once." *State v. Williams*, 355 N.C. 501,

531, 565 S.E.2d 609, 627 (2002) (citation omitted), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003).

To determine whether there was a transactional connection between joined offenses, "[w]e consider the following factors to make this determination: (1) the nature of the offenses charged; (2) any commonality of facts between the offenses; (3) the lapse of time between the offenses; and (4) the unique circumstances of each case." *State v. Perry*, 142 N.C. App. 177, 181, 541 S.E.2d 746, 749 (2001) (citation and quotation marks omitted).

Nevertheless, a motion to sever offenses must be granted if, during trial,

> it is found necessary to achieve a fair determination of the defendant's guilt or innocence of each offense. The court must consider whether, in view of the number of offenses charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

N.C. Gen. Stat. § 15A-927(b)(2) (2017). "The question before the court on a motion to sever is whether the offenses are so separate in time and place and so distinct in circumstances as to render consolidation unjust and prejudicial." *State v. Bracey*, 303 N.C. 112, 117, 277 S.E.2d 390, 394 (1981).

Additionally, our Supreme Court and the Supreme Court of the United States have held that severance may be necessary "[i]f such consolidation hinders or deprives the accused of his ability to present his defense." *State v. Davis*, 289 N.C. 500, 508, 223 S.E.2d 296, 301 (citation omitted), *vacated in part on other grounds*, 429 U.S. 809, 50 L. Ed. 2d 69 (1976); *see also Pointer v. United States*, 151 U.S. 396, 403, 38 L. Ed. 208, 212 (1894) (recognizing the fundamental principal that a court "must not permit the defendant to be embarrassed in his defence by a multiplicity of charges embraced in one indictment and to be tried by one jury").

However, severance is not required merely because the defendant would have elected to testify against one offense without being compelled to testify against another. *Davis*, 289 N.C. at 508, 223 S.E.2d at 301 (citation omitted); *see also Shipp*, 155 N.C. App. at 306, 573 S.E.2d at 729 ("A defendant fails to show abuse of discretion on the part of the trial judge in joining two offenses for trial where defendant's only assertion of possible prejudice is that he might have elected to testify in one of the cases and not in the others." (citation and quotation marks omitted));

State v. Sutton, 34 N.C. App. 371, 374, 238 S.E.2d 305, 307 (1977), *disc. review denied*, 294 N.C. 186, 241 S.E.2d 521 (1978) (finding the trial court did not abuse its discretion in denying defendant's motion to sever because his "only assertion of possible prejudice is that he might have elected to testify in one of the cases and not in the others").

Here, the transactional connection between the offenses was sufficient for joinder. Each offense arose from a continuous course of violent criminal conduct related to gang rivalries. The evidence tended to show that the Starmount Circle shooting was in retaliation for the earlier National Grocery shooting. The two shootings occurred the same day; the same 9-mm pistol was used in both shootings; and witnesses testified at trial to evidence that applied to both shootings, or testified that they were present at both crime scenes. Thus, joinder was proper.

Additionally, neither the number of offenses nor the complexity of the evidence offered necessitated severance of the offenses for trial. The evidence presented was not unduly complicated or confusing. The jury instructions clearly and carefully separated Defendant's offenses, and the verdict forms unmistakably distinguished the offenses according to the victim's names. Therefore, no showing has been made that severance was necessary to ensure a fair determination by the jury on each charge.

Moreover, we reject Defendant's assertion that severance was necessary to protect Defendant's constitutional right to *choose* to testify against charges arising from either the National Grocery shooting or the Starmount Circle shooting without testifying regarding the other shooting. This is an insufficient argument to warrant severance. As previously discussed, a trial court does not abuse its discretion by refusing to sever multiple offenses against the same defendant "where defendant's only assertion of possible prejudice is that he might have elected to testify in one of the cases and not in the others." *Shipp*, 155 N.C. App. at 306, 573 S.E.2d at 729 (citation and quotation marks omitted); *see also Davis*, 289 N.C. at 508, 223 S.E.2d at 301; *Sutton*, 34 N.C. App. at 374, 238 S.E.2d at 307.

[2] Finally, we decline to address the merits of Defendant's argument that the trial court's denial of his motion to sever prevented a fair trial as it allowed the jury to hear testimony regarding Defendant's gang ties and evidence of seven-year-old Jones' murder. Defendant waived appellate review of this issue as he did not raise this argument at trial. "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, *stating the specific grounds for the ruling the party desired* the court to make

if the specific grounds were not apparent from the context." N.C.R. App. P. 10(a)(1) (emphasis added).

Accordingly, the trial court did not abuse its discretion by denying Defendant's motion to sever.

II. Hearsay Jury Instruction

[3] Defendant argues next that the trial court erred by failing to instruct the jury on their limited use of six hearsay statements for corroborative and impeachment purposes only. While we agree that this omission was error, we find the error harmless.

"It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). "The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973), *cert. denied*, 418 U.S. 905, 41 L. Ed. 2d 1153 (1974). "Failure to instruct upon all substantive or material features of the crime charged is error." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989).

However, "[w]hen a trial court agrees to give a requested pattern instruction, an erroneous deviation from that instruction is preserved for appellate review without further request or objection." *State v. Lee*, 370 N.C. 671, 676, 811 S.E.2d 563, 567 (2018). "[A] request for an instruction at the charge conference is sufficient compliance with the rule to warrant our full review on appeal where the requested instruction is subsequently promised but not given, notwithstanding any failure to bring the error to the trial judge's attention at the end of the instructions." *Id.* (quoting *State v. Ross*, 322 N.C. 261, 265, 367 S.E.2d 889, 891 (1988)). Where the trial court "substantively deviate[s] from the agreed-upon pattern jury instruction, . . . this issue [is preserved] for appellate review under N.C.G.S. § 15A-1443(a)." *Id.*

Per Section 15A-1443(a), a defendant

> is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. *The burden of showing such prejudice under this subsection is upon the defendant.* Prejudice also exists in any instance

> in which it is deemed to exist as a matter of law or error is deemed reversible per se.

N.C. Gen. Stat. § 15A-1443(a) (2017) (emphasis added).

Here, at least twice during trial, Defendant specifically requested North Carolina Pattern Jury Instruction 105.20 ("Instruction 105.20"), which limits the jury's permissible reliance on hearsay statements to corroborative and impeachment purposes only. During the charge conference, the parties and trial court further agreed that the jury would be charged with Instruction 105.20. However, the trial court omitted Instruction 105.20 from the final jury charge. We conclude that, by omitting Instruction 105.20 from the final jury charge, the trial court committed error, which we "review under N.C.G.S. § 15A-1443(a)." *Lee*, 370 N.C. at 676, 811 S.E.2d at 567. Nevertheless, Defendant has failed to demonstrate that there is "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." N.C. Gen. Stat. § 15A-1443(a).

The trial court reiterated Instruction 105.20—or a close variation of it—six times to the jury throughout trial. Although the trial court failed to provide Instruction 105.20 during the final jury charge, the jury was sufficiently advised of this instruction throughout relevant portions of the trial.

Moreover, even if the instructions had not been given during the course of the trial, Defendant cannot show prejudice as the record reflects overwhelming evidence of Defendant's guilt. Defendant does not contest the trial testimony of Spells, his fellow gang member. Spells testified that Defendant returned fire on Pate using his 9-mm pistol at the National Grocery shooting. Spells further testified that Defendant was armed with the same 9-mm pistol when he exited Spells' car and opened fire at Starmount Circle later that same evening. Moreover, the physical evidence showed that the 9-mm shell casings found at the National Grocery and Starmount Circle scene matched. Finally, police also recovered a cigarette at the Starmount Circle crime scene which connected Defendant to the shooting. Given the overwhelming evidence of Defendant's guilt, Defendant has failed to demonstrate that but for the trial court's instructional error, there was a reasonable possibility of a different outcome at trial. Thus, Defendant has failed to demonstrate prejudice pursuant to N.C. Gen. Stat. §15A-1443(a).

III. Removing Impaneled Juror

[4] Finally, Defendant argues that the trial court erred by dismissing an impaneled juror. We disagree.

Trial courts' "decisions relating to the competency and service of jurors are not reviewable on appeal absent a showing of abuse of discretion, or some imputed legal error." *State v. Davis*, 325 N.C. 607, 628, 386 S.E.2d 418, 429 (1989) (citation and quotation marks omitted), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990). The abuse of discretion standard applies because "[t]he trial court's discretion in supervising the jury continues beyond jury selection and extends to decisions to excuse a juror and substitute an alternate." *State v. Lovin*, 339 N.C. 695, 715-16, 454 S.E.2d 229, 241 (1995) (citation omitted). Accordingly, "[t]he decision whether to reopen examination of a juror previously accepted by both the State and defendant . . . is a matter within the sound discretion of the trial judge." *State v. Freeman*, 314 N.C. 432, 437, 333 S.E.2d 743, 746 (1985) (citation and quotation marks omitted).

"If before final submission of the case to the jury, any juror dies, becomes incapacitated or disqualified, or is discharged for any other reason, an alternate juror becomes a juror, in the order in which selected, and serves in all respects as those selected on the regular trial panel." N.C. Gen. Stat. § 15A-1215(a) (2017). This section "allows the trial court to replace a juror with an alternate juror should the original one become disqualified or be discharged for some reason." *State v. Richardson*, 341 N.C. 658, 672-73, 462 S.E.2d 492, 502 (1995) (citation omitted).

"The test is whether the challenged juror is unable to render a fair and impartial verdict." *Id.* (citation and quotation marks omitted).

> The trial court has the opportunity to see and hear the juror on *voir dire* and, having observed the juror's demeanor and made findings as to his credibility, to determine whether the juror can be fair and impartial. For this reason, among others, it is within the trial court's discretion, based on its observation and sound judgment, to determine whether a juror can be fair and impartial.

Id. (citation omitted). Therefore, "[a]bsent a showing that the trial court's decision was so arbitrary that it could not have been the result of a reasoned decision, the decision must stand." *Id.* (citation omitted).

Here, five days into the trial and after the jury had been impaneled, the State moved for the trial court to inquire into the competency of Juror 7 to render a fair and impartial verdict. The trial court conducted a hearing on the motion in which a 21-year veteran bailiff took the stand and testified that Juror 7 spoke with him during a break on the previous day. Juror 7 had first asked the bailiff "if they could have prayer during the breaks in the jury room." Juror 7 then said that "he felt it

was inappropriate and rude for [the District Attorney] to be pointing at people in the audience while a witness was testifying."

Juror 7 was subsequently questioned about the statements. Juror 7 testified that he did not "remember making any statement pertaining to the case" and agreed that he had not "formed an opinion concerning any of the parties in this case that would affect [him] from being a fair and impartial juror in this matter." Rather than dismiss Juror 7, the trial court gave curative instructions to the jury.

Later that same day, the State played audio from a jailhouse call between Defendant and Defendant's mother, which revealed that the Defendant's mother knew Juror 7. The State renewed its request to dismiss Juror 7. The trial court again asked Juror 7 whether he told "the bailiff yesterday at the lunch break that [he] felt that the District Attorney was rude in that he pointed out certain individuals within the courtroom." In response, Juror 7 admitted that he could "vaguely remember" discussing the jury's security and whether he could pray for the jury because he believed that they were "in jeopardy somehow."

Given this testimony, the trial court made the following findings of fact and conclusions of law:

> This matter coming on to be heard and being heard before the undersigned judge presiding on this date, the 19th of May 2017, upon reconsideration of the motion to excuse [Juror 7], . . . for expressing an opinion concerning any matter involved in this case, that sworn testimony was taken from the bailiff this morning in which he testified that [Juror 7] mentioned to him that he was, that he thought that the District Attorney was rude at such time he pointed to certain individuals within the courtroom. Upon given a written transcript of the question and answer session with [Juror 7] earlier today, the record reflects upon my question, "have you discussed this case with anyone in any manner outside of this courtroom" that his response was "no, sir." Upon questioning him at the, after lunch break concerning this issue, the witness, [Juror 7], among other things, stated that he was not sure and could not remember.
>
> The Court having heard the testimony of the bailiff and having heard his responses to ensure that the Defendant has a right to a neutral and impartial jury, the Court makes a finding, after these findings of fact,

> makes conclusions of law that [Juror 7] made, expressed an opinion about this case in disregard to the Court's instructions. Further, that it is within the sound discretion of the Court concerning jury conduct based upon the foregoing findings of fact and conclusions of law, the Court finds that an opinion was expressed concerning this case in violation of the Court's instructions, therefore, [Juror 7] has been excused by the Court.

Based on the trial court's investigation and findings that Juror 7 provided different response to the same question during two separate hearings and ignored the trial court's instructions, the trial court dismissed Juror 7. Defendant has failed to demonstrate that the trial court's decision to dismiss Juror 7 "was so arbitrary that it could not have been the result of a reasoned decision." *Richardson*, 341 N.C. at 673, 462 S.E.2d at 502 (citation omitted). Therefore, the trial court did not abuse its discretion by dismissing Juror 7.

Conclusion

The trial court did not abuse its discretion by denying Defendant's motion for severance or dismissing Juror 7. Although omitting the requested instruction during the final jury charge was erroneous, this error was harmless. Accordingly, Defendant received a fair trial, free from prejudicial error.

NO ERROR.

Judges DIETZ and TYSON concur.

STATE OF NORTH CAROLINA
v.
DESHAWN LAMAR PERRY

No. COA17-1330

Filed 16 October 2018

1. Criminal Law—motion to disqualify prosecutor—conflict of interest—proof required

The trial court did not abuse its discretion by denying defendant's motions to disqualify the entire district attorney's office from prosecuting his case for common law robbery and attaining habitual felon status because there was no proof of an actual conflict of interest. The assistant district attorney who had previously represented defendant in one of the predicate felony convictions supporting habitual felon status had not represented defendant in any proceedings related to the current charges.

2. Appeal and Error—preservation of issues—motion to disqualify prosecutor—ruling required

Defendant's third request to disqualify the entire district attorney office from pursuing habitual felon status against him was not preserved for appellate review because, unlike his first two motions, he did not obtain a ruling from the trial court, and instead elected to forgo the trial and unconditionally plead guilty to habitual felon status.

3. Criminal Law—motion to disqualify prosecutor—previous denials not based on State's assurance

The Court of Appeals rejected defendant's argument that his third motion to disqualify the entire district attorney office from pursuing habitual felon status against him should have been allowed after the participation in the first phase of his trial (for common law robbery) by an assistant district attorney (ADA) who had previously represented defendant in one of the predicate felony convictions. The trial court's first two denials were not conditioned on the ADA not participating; the court merely noted that the prosecutor had "given assurances" that the ADA would not be involved.

Appeal by defendant from judgments entered 21 March and 6 April 2017 by Judge Alan Z. Thornburg in Henderson County Superior Court. Heard in the Court of Appeals 8 August 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Creecy C. Johnson, for the State.

Meghan Adelle Jones for defendant.

ELMORE, Judge.

Defendant Deshawn Lamar Perry appeals judgments entered after a jury convicted him of misdemeanor resisting a public officer and of felonious common law robbery, he later pled guilty to attaining habitual felon status, and the trial court sentenced him for common law robbery as an habitual felon. He asserts the trial court erred by denying his motion to recuse the entire Henderson County District Attorney's ("HCDA") Office from prosecuting the charges against him because one of the State's attorneys, Henderson County Assistant District Attorney Michael Bender ("ADA Bender"), previously represented him in one of the felonies underlying the habitual felon charge, and because the State later violated the trial court's express condition that ADA Bender not participate in the prosecution.

Because defendant failed to demonstrate an actual conflict of interest existed in ADA Bender participating in the prosecution of the unrelated charges for resisting a public officer and common law robbery, the trial court did not abuse its discretion in denying the disqualification motion as to those particular charges. Although ADA Bender previously represented defendant in one of the predicate felonies underlying the habitual felon charge and briefly participated in the prosecution at the first phase of trial in contradiction to the State's assurances, because the trial court's initial denial was unconditional and defendant never obtained a ruling on his third disqualification motion at the start of the habitual felon phase of trial in light of his decision to unconditionally plead guilty to the habitual offender charge, the trial court did not abuse its discretion in denying the disqualification motion as to that charge. Accordingly, we hold there was no error below.

I. Background

On 2 November 2015, defendant was indicted for injury to personal property in file no. 15 CRS 53958, resisting a public officer and giving false information to police in file no. 15 CRS 53959, and common law robbery in file no. 15 CRS 53960, arising from an incident that occurred 6 October 2015. On 4 January 2016, defendant was indicted for attaining habitual felon status in file no. 16 CRS 25, based upon unrelated prior convictions for (1) attempted common law robbery on 13 May 2011,

(2) possession with intent to sell or distribute a Schedule II controlled substance on 18 November 2011, and (3) common law robbery on 20 March 2013.

At a pretrial hearing on 11 January 2017, defendant moved for recusal of the entire HCDA's Office from prosecuting the charges against him. He argued that one of the State's two prosecutors, ADA Bender, had previously represented him in one of the three felonies underlying the habitual felon charge. The State's other prosecutor, Henderson County Assistant District Attorney Doug Mundy ("ADA Mundy"), replied he perceived no conflict of interest because ADA "Bender [did] not intend to sit in prosecution of that case"; rather, ADA Mundy was "going to be prosecuting that case." After an unrecorded bench conference, the trial court "den[ied] the motion at th[at] time" and noted ADA Mundy "has given assurances that [ADA] Bender will in no way be involved in this case."

On 20 March 2017, at the start of trial on the charges of common law robbery, injury to personal property, resisting a public officer, and giving false information to police, defendant renewed his recusal motion "based on [ADA] Bender having represented [his] client in a previous matter which is an ancillary indictment." In response, the trial court "adopt[ed] it[ ]s previous ruling and order," thereby denying defendant's second recusal motion.

During trial, ADA Mundy served as the primary prosecutor. However, the trial court introduced both ADAs Mundy and Bender to the jury as the State's attorneys, ADA Bender attended bench and chambers conferences, and ADA Bender argued to the trial court on issues concerning jury instructions. After the trial court dismissed the injury to personal property and giving false information to police charges, it instructed the jury on the charges of robbery and resisting a public officer. On 21 March 2017, the jury found defendant guilty of misdemeanor resisting a public officer and of felonious common law robbery.

At the start of the habitual felon phase of trial, defendant's counsel indicated defendant "want[ed] to move forward with the hearing for that portion" and "renew[ed his] motion for recusal." He argued that "previously . . . , we were told that [ADA] Bender was not going to participate in the trial" and "[e]ven though [ADA Bender] wasn't going to participate in the trial, there is an issue when an individual who represented him as a defense attorney is now seated at the prosecuting table, and my client is asking me 'why he is over there?' " After an unrecorded conference in chambers with both parties' attorneys, however, defendant never obtained a ruling on his third motion and instead pled guilty to attaining habitual felon status.

Following these proceedings, on 21 March 2017 the trial court entered judgment on the resisting a public officer conviction, imposing a sentence of sixty days' imprisonment. The trial court also rendered judgment on the robbery and habitual felon convictions, imposing fifty-eight to eighty-two months' imprisonment. On 6 April 2017, however, the trial court entered a judgment resentencing defendant on the robbery conviction as an habitual felon, imposing a sentence of sixty-six to ninety-two months' imprisonment. Defendant filed written notice of appeal on 11 April 2017.

II. Jurisdiction

As an initial matter, defendant has petitioned this Court to issue a writ of *certiorari* to review the judgment entered on the misdemeanor resisting a public officer conviction. Although defendant's 11 April 2017 written notice of appeal was timely filed as to the 6 April judgment entered on the robbery and habitual offender convictions, it was untimely as to the 21 March judgment on the resisting a public officer conviction. *See* N.C. R. App. P. 4(a)(2) (requiring written notice of appeal be filed within fourteen days from entry of judgment). In its response, the State does not oppose the petition but acknowledges our discretion to issue a writ of *certiorari* when "the right to prosecute an appeal has been lost by failure to take timely action[.]" *See* N.C. R. App. P. 21(a)(1). Based on the arguments advanced in defendant's petition, in our discretion we allow his petition and issue a writ of *certiorari* to review both judgments.

III. Analysis

On appeal, defendant asserts the trial court erred by denying his motions to recuse the entire HCDA's Office from prosecuting the charges against him because ADA Bender previously represented him in one of the three felony convictions underlying the habitual felon charge. He argues the trial court (1) failed to properly inquire into whether ADA Bender divulged any confidential information to other prosecutors in the HCDA's Office regarding the case in which he previously represented defendant that formed part of the habitual felon charge; and (2) should have allowed his disqualification motion because the State violated the condition that ADA Bender not participate in the prosecution. We hold the trial court did not abuse its discretion in denying the motions.

A. Review Standard

We review a trial court's denial of a motion to compel recusal of a prosecutor or an entire district attorney's office, which is more accurately

considered a motion to disqualify, *see State v. Smith*, ___ N.C. App. ___, ___, 813 S.E.2d 867, 869 (2018) ("Because the trial court's order compels the District Attorney's Office's recusal, we review the order as one disqualifying the District Attorney and his staff."), for abuse of discretion, *see State v. Scanlon*, 176 N.C. App. 410, 434, 626 S.E.2d 770, 786 (2006) ("[A]bsent a showing of an abuse of discretion, a decision regarding whether to disqualify counsel 'is discretionary with the trial judge and is not generally reviewable on appeal.' " (citation omitted)). "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

B. Discussion

[1] "Where disqualification is sought, the trial court must make inquiry as to whether the defendant's former counsel participated in the prosecution of the case or divulged any confidential information to other prosecutors." *State v. Camacho*, 329 N.C. 589, 601, 406 S.E.2d 868, 875 (1991) (quoting *Young v. State*, 297 Md. 286, 297, 465 A.2d 1149, 1155 (1983)). "[A] prosecutor may not be disqualified from prosecuting a criminal action in this State unless and until the trial court determines that an actual conflict of interests exists." *Id.* An actual conflict of interest exists

> where a District Attorney or a member of his or her staff has previously represented the defendant *with regard to the charges to be prosecuted* and, as a result of that former attorney-client relationship, the prosecution has obtained confidential information which may be used to the defendant's detriment at trial.

Id. (emphasis added); *see also* N.C. St. B. Rev. R. Prof'l Conduct r 1.11(d) ("[A] lawyer currently serving as a public officer or employee: (1) is subject to Rule[ ] . . . 1.9; and (2) shall not: participate in a matter in which the lawyer participated personally and substantially while in private practice . . . ."); N.C. St. B. Rev. R. Prof'l Conduct r. 1.9(a) ("A lawyer who has formerly represented a client in a matter shall not thereafter represent another person *in the same or a substantially related matter* in which that person's interests are materially adverse to the interests of the former client . . . ." (emphasis added)).

Here, to support his first motion to recuse the entire HCDA's Office from the prosecution, defendant argued ADA Bender represented him "in a case which forms a part of the prosecution's indictment for habitual

felon." To support his second recusal motion at the start of trial on the charges against him in 15 CRS 53958 of injury to personal property, in 15 CRS 53959 of resisting an officer and of providing false information to police, and in 15 CRS 53960 of common law robbery, defendant argued ADA Bender "represented [him] in a previous matter which is an ancillary indictment"—that is, the habitual felon charge. To support his third recusal motion at the start of trial on the habitual felon charge in 16 CRS 25, defendant argued that "previously . . . , we were told that [ADA] Bender was not going to participate in the trial" and "[e]ven though [ADA Bender] wasn't going to participate in the trial, there is an issue when an individual who represented him as a defense attorney is now seated at the prosecuting table, and my client is asking me 'why he is over there?' "

As ADA Bender did not previously represent defendant in the charges to be tried against him in 15 CRS 53958–60, defendant failed to show the actual conflict of interest required by *Camacho* to disqualify ADA Bender, much less the entire HCDA's Office, from prosecuting those charges. *Cf. Worley v. Moore*, 370 N.C. 358, 365, 368, 807 S.E.2d 133, 139, 141 (2017) (instructing that the correct legal standard in assessing conflicts of interest under North Carolina State Bar Revised Professional Conduct Rule 1.9(a) "is whether, objectively speaking, 'a substantial risk' exists 'that the lawyer has information to use in the subsequent matter' " —not "the outmoded 'appearance of impropriety' test"). Without proof of an actual conflict of interest as to those charges, further inquiry or direction by the trial court was unnecessary. Accordingly, defendant has failed to show the trial court's denial of his disqualification motion as to the prosecution of these particular charges was "so arbitrary that it could not have been the result of a reasoned decision." *White*, 312 N.C. at 777, 324 S.E.2d at 833.

[2] As to the habitual felon charge in the second phase of trial, because the record indicates ADA Bender represented defendant in one of the predicate felony convictions, *Camacho* instructs the trial court should have inquired into whether ADA Bender divulged any confidential information to other prosecutors that could have been detrimental to defendant's trial on the habitual felon charge in order to find whether an actual conflict of interest existed. *Id.* at 601, 406 S.E.2d at 875. Defendant at the start of the habitual felon proceeding initially indicated he intended to proceed with trial and moved for a third time to disqualify the HCDA's Office, this time on the additional basis that ADA Bender participated in the prosecution at the first phase of trial. However, following an immediate unrecorded chambers conference with both parties' attorneys,

defendant never obtained a ruling on this third motion as it related to the habitual felon charge on these grounds, *see* N.C. R. App. P. 10(a)(1) ("It is also necessary for the complaining party to obtain a ruling upon the party's . . . objection[ ] or motion."), and instead elected to forgo the trial and unconditionally plead guilty to attaining habitual felon status as charged.

Even had the trial court conducted a formal hearing on defendant's motion and found an actual conflict of interest would exist if ADA Bender assisted in prosecuting the habitual felon charge, whether it was a disqualifying conflict was a matter within its sound discretion. *Camacho* instructs disqualifying the entire district attorney's office under these facts, as defendant requested, would have been impermissibly excessive. *Id.* at 601, 406 S.E.2d at 875 ("Even [if an actual conflict is found to exist], however, any order of disqualification ordinarily should be directed only to individual prosecutors who have been exposed to such information." (citation omitted)). And given that ADA Bender's prior representation of defendant was wholly unrelated to the charges in the first phase of trial, the only rulings on the motions were obtained before the jury found defendant guilty of an underlying felony to which a habitual offender charge could attach, two unrecorded attorney conferences were held immediately following defendant's first and third disqualification motions before and at the start of the habitual offender proceeding, and defendant failed to argue on the record how an actual disqualifying conflict might exist when prior convictions necessary to prove habitual felon status are public records but, rather, appeared instead to argue "the outmoded 'appearance of impropriety' test[,]" *Worley*, 370 N.C. at 368, 807 S.E.2d at 141, we cannot conclude the trial court's decision not to disqualify ADA Bender from the prosecution at the time it rendered its rulings was "so arbitrary that it could not have been the result of a reasoned decision." *White*, 312 N.C. at 777, 324 S.E.2d at 833.

[3] Defendant also argues the trial court further erred by not allowing his disqualification motion after the State allegedly violated the condition that ADA Bender not participate in the prosecution. We respectfully disagree with defendant's interpretation. During its ruling on defendant's first recusal motion, which it adopted in its second ruling, the trial judge stated: "I'm going to deny the motion at this time. And the Prosecutor has given assurances that [ADA] Bender will in no way be involved in this case." Although the State concedes ADA Bender, in contradiction to that assurance, did participate in the prosecution, we do not interpret the trial court's denials as being conditioned upon

ADA Bender not participating in the first phase of trial and, therefore, overrule this argument.

IV. Conclusion

Based upon the particular facts of this case, defendant has failed to show that the trial court's denial of his motions to disqualify the entire HCDA's Office from prosecuting the charges against him was "so arbitrary that it could not have been the result of a reasoned decision." *White*, 312 N.C. at 777, 324 S.E.2d at 833. Accordingly, we hold there was no error below.

NO ERROR.

Judges HUNTER, JR. and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
WILLIAM YATES

No. COA18-158

Filed 16 October 2018

Appeal and Error—record on appeal—transcript—unavailable—adequate alternative—meaningful appellate review

Defendant was awarded a new trial on charges stemming from a sexual assault where a portion of the trial transcript, which included cross-examination of the victim, was missing. Defense counsel made sufficient efforts to reconstruct the missing portion of the transcript, those efforts did not produce an adequate alternative to a verbatim transcript, and the lack of an adequate alternative deprived defendant of meaningful appellate review where defense counsel was precluded from identifying potential meritorious issues for appeal.

Appeal by defendant from judgments entered 23 August 2016 by Judge Thomas H. Lock in Cumberland County Superior Court. Heard in the Court of Appeals 4 September 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Melissa H. Taylor, for the State.

Mark L. Hayes for defendant-appellant.

ARROWOOD, Judge.

William Yates appeals from judgments entered upon his convictions for second degree kidnapping, communicating threats, assault with a deadly weapon, breaking or entering, assault on a female, first degree rape, and two counts of first degree sexual assault. Because a recording equipment malfunction prevented the court reporter from producing a full transcript of the trial, including crucial portions of the victim's testimony such as cross-examination, defendant is entitled to a new trial.

I. Background

On 13 October 2014, a Cumberland County Grand Jury returned indictments charging defendant with felonious breaking or entering, felonious assault inflicting physical injury by strangulation, misdemeanor assault on a female, first degree kidnapping, misdemeanor communicating threats, misdemeanor assault with a deadly weapon, first degree forcible rape, and two counts of first degree sexual offense. The State moved to join the offenses for trial and the motion was granted on 4 January 2016. Defendant's case was tried in Cumberland County Superior Court before the Honorable Thomas H. Lock beginning on 16 August 2016.

At the end of the State's evidence, the trial court granted defendant's motion to dismiss the felonious assault inflicting physical injury by strangulation charge and denied defendant's motion to dismiss any of the other charges. On 19 August 2016, the jury returned verdicts finding defendant guilty of felonious breaking or entering, assault on a female, first degree kidnapping, communicating threats, assault with a deadly weapon, first degree rape, and two counts of first degree sexual offense. Also on 19 August 2016, the trial court signed an order dismissing the assault inflicting physical injury by strangulation charge. The trial court entered a prayer for judgment continued until 23 August 2016.

On 22 August 2016, defendant filed a motion for appropriate relief ("MAR") seeking to have the verdicts set aside and for a new trial. On 23 August 2016, the trial court denied defendant's MAR and entered judgments. The court first arrested judgment on the first degree kidnapping conviction in favor of entering judgment for second degree kidnapping. The court consolidated the second degree kidnapping, communicating threats, assault with a deadly weapon, breaking or entering, and assault on a female convictions and entered judgment

sentencing defendant to a term of 35 to 54 months' imprisonment. The court then entered a separate judgment on the first degree rape conviction sentencing defendant to a concurrent term of 336 to 464 months' imprisonment. Lastly, the court consolidated the two first degree sexual offense convictions and entered a third judgment sentencing defendant to a term of 336 to 464 months' imprisonment to begin at the expiration of the sentence imposed for first degree rape. Defendant gave notice of appeal in open court.

II. Discussion

On appeal, defendant argues that he has been denied a meaningful appeal because a portion of the trial transcript is missing and that the trial court erred in denying his motions to dismiss for insufficiency of the evidence. We grant defendant a new trial based on the incomplete transcript of the trial proceedings.

1. Missing Transcript

In the first issue on appeal, defendant points out that a portion of the trial transcript from 18 August 2016 is missing. Defendant asserts that he is entitled to a new trial because the incomplete transcript has deprived him of a meaningful appeal.

This Court has explained that "[o]ur caselaw contemplates the possibility that the unavailability of a verbatim transcript may in certain cases deprive a party of its right to meaningful appellate review and that, in such cases, the absence of the transcript would itself constitute a basis for appeal." *In re Shackleford*, __ N.C. App. __, __, 789 S.E.2d 15, 18 (2016) (citing *State v. Neely*, 21 N.C. App. 439, 441, 204 S.E.2d 531, 532 (1974)).

> However, the unavailability of a verbatim transcript does not automatically constitute reversible error in every case. Rather, to prevail on such grounds, a party must demonstrate that the missing recorded evidence resulted in prejudice. General allegations of prejudice are insufficient to show reversible error. Moreover, the absence of a complete transcript does not prejudice the defendant where alternatives are available that would fulfill the same functions as a transcript and provide the [appellant] with a meaningful appeal.

Id. at __, 789 S.E.2d at 18 (internal quotation marks, citations, and emphasis omitted).

To determine whether the right to a meaningful appeal has been lost, our Courts conduct a three-step inquiry. First, we must determine whether defendant has "made sufficient efforts to reconstruct the [proceedings] in the absence of a transcript." *Id.* at __, 789 S.E.2d at 18. Second, we must determine whether those "reconstruction efforts produced an adequate alternative to a verbatim transcript—that is, one that would fulfill the same functions as a transcript . . . ." *Id.* at __, 789 S.E.2d at 19 (internal quotation marks and citation omitted). Third, "we must determine whether the lack of an adequate alternative to a verbatim transcript of the [proceedings] served to deny [defendant] meaningful appellate review such that a new [trial] is required." *Id.* at __, 789 S.E.2d at 20.

In the present case, the court reporter delivered a three volume transcript of the trial proceedings to defendant. Volume I of the transcript includes the trial court proceedings on 16 and 17 August 2016, during which the court heard pretrial motions, conducted jury selection, and began to hear the State's evidence. At the time the trial was adjourned for the evening on 17 August 2016, the State was conducting its direct examination of the alleged victim. Upon releasing the alleged victim from the witness stand, the trial court instructed her "to return in the morning." Volume I of the transcript ends with a note indicating "[t]he trial adjourned at 5:04 p.m., August 17, 2016, and reconvened at 9:30 a.m., August 18 2016." Volume II of the transcript, however, begins with a note indicating that "[t]he hearing convened at 11:08 a.m., August 18, 2016[.]" At that time, the State called its next witness.

There is no record of what happened in court on 18 August 2016 from 9:30 a.m. to 11:08 a.m. In place of a verbatim transcript, defendant's appellate counsel prepared and delivered a narrative form transcript. The narrative form transcript states only that "[b]etween 9:30 AM and 11:08 AM on 18 August 2016, trial proceedings occurred which included, at minimum, the cross examination of the State's witness[, the alleged victim]." However, given how the proceedings ended on 17 August 2016, it is likely the State also continued its direct examination of the alleged victim during that time. It is also possible that other witnesses testified.

Regarding the first two inquiries set out in *Shackleford*, defendant contends that he made sufficient efforts to reconstruct the missing portion of the transcript and that the alternative is inadequate. We agree.

Defendant's appellate counsel included with the narrative form transcript a "certificate of transcript" that was verified and notarized. The certificate explains that the missing portion of the transcript is the result

of a recording malfunction and that, after neither the court reporter nor her supervisor could recover any recording of the proceedings from 9:30 a.m. to 11:08 a.m. on 18 August 2016, this Court granted a motion to prepare the transcript in narrative form. The certificate then details counsel's efforts to reconstruct the missing portion of the transcript.

Those efforts began with the mailing of a letter to the presiding judge, the prosecutor, the court reporter, and defense attorneys on 18 October 2017 requesting that they share their recollection of what occurred during the portion of the trial for which there is no transcript. None of those parties involved in the trial responded to the letter. A follow up email was sent to the prosecutor, the court reporter, and defense attorneys on 13 November 2017 with the original letter attached. The presiding judge was omitted from the email because his email address was unknown. The email once more requested assistance in reconstructing the missing transcript. Again, there was no response. The certificate further explains that the only information defendant's appellate counsel has about the unrecorded portion of the trial is that cross-examination of the alleged victim did take place. Counsel was able to speak with the prosecutor by telephone on 22 August 2017 and the prosecutor confirmed that defense counsel did cross-examine the alleged victim.

Comparing these efforts by defendant's appellate counsel to reconstruct the missing transcript to those efforts determined to be sufficient in *State v. Hobbs*, 190 N.C. App. 183, 660 S.E.2d 168 (2008), and *Shackelford*, we hold the efforts in the present case were sufficient.

In *Hobbs*, in which the transcripts of the evidentiary phase of the defendant's trial were unavailable for the defendant's appeal, the defendant's appellate counsel contacted the defendant's trial counsel, the prosecutor, and the presiding judge in an attempt to reconstruct the transcript. 190 N.C. App. at 186-87, 660 S.E.2d at 170-71. Responses were received from the defendant's trial counsel and the presiding judge indicating they either had little memory of the proceedings or had no notes. *Id.* 186-87, 660 S.E.2d 171. There was no indication of a response from the prosecutor. *Id.* at 187, 660 S.E.2d at 171. Although noting in a footnote that "the precise burden imposed upon appellants for reconstructing the records has not been defined[,]" *Id.* at 187 n.3, 660 S.E.2d at 171 n.3, this Court held as follows:

> Although the better practice would have been for defendant's appellate counsel to follow up with the prosecutor via telephone after failing to receive a response from her letters, the State has advanced no argument in its brief to

> this Court that the letters were not received. Accordingly, defendant satisfied his burden of demonstrating the absence of available alternatives to the missing transcripts.

Id. at 187, 660 S.E.2d at 171.

Similarly in *Shackleford*, in which the transcript of the respondent's involuntary commitment hearing was unavailable for the respondent's appeal, the respondent's appellate counsel sent letters to those parties present at the hearing, including the judge, deputy clerk, respondent's counsel, respondent, and others, seeking assistance in reconstructing the hearing transcript. __ N.C. App. at __, 789 S.E.2d at 17-18. The respondent's trial counsel provided notes from the hearing, but otherwise the responses from those present at the hearing were not helpful. *Id.* at __, 789 S.E.2d at 18. Relying on *Hobbs*, this Court explained that "[the r]espondent's appellate counsel took essentially the same steps as the appellants' attorney in *Hobbs*. Therefore, we similarly conclude that [r]espondent has satisfied his burden of attempting to reconstruct the record." *Id.* at __, 789 S.E.2d at 19.

In this case, defendant's appellate counsel's efforts to reconstruct the missing portion of the transcript emulated those efforts determined to be sufficient in *Hobbs* and *Shackleford* and included a follow-up communication that this Court noted in *Hobbs* was "better practice." Thus, we hold defendant has met his burden.

Notwithstanding the efforts of defendant's appellate counsel, defendant was unable to produce an adequate alternative to a verbatim transcript. As detailed above, the reconstructed transcript provides only that "[b]etween 9:30 AM and 11:08 AM on 18 August 2016, trial proceedings occurred which included, at minimum, the cross-examination of the State's witness[, the alleged victim]."

In *Shackleford*, this Court described an "adequate alternative to a verbatim transcript" as "one that 'would fulfill the same functions as a transcript . . . .' " *Id.* at __, 789 S.E.2d at 19 (quoting *State v. Lawrence*, 352 N.C. 1, 16, 530 S.E.2d 807, 817 (2000)). This Court also noted that "in virtually all of the cases in which we have held that an adequate alternative to a verbatim transcript existed, the transcript of the proceeding at issue was only partially incomplete, and any gaps therein were capable of being filled." *Id.* at __, 789 S.E.2d at 19 (emphasis omitted). *Shackleford*, however, was distinguishable from those cases in which only part of the transcript was missing because in *Shackleford*, "the transcript of the entire proceeding is unavailable, and the only independent account of what took place at the hearing consists of five pages

of bare-bones handwritten notes that—in addition to not being wholly legible—clearly do not amount to a comprehensive account of what transpired at the hearing." *Id.* at __, 789 S.E.2d at 19-20 (emphasis omitted). Thus, this Court concluded in *Shackleford* that the notes from the respondent's trial counsel did not constitute an adequate alternative to a verbatim transcript of the hearing. *Id.* at __, 789 S.E.2d at 20.

Although only a portion of the transcript was missing in this case, unlike those cases referenced in *Shackleford* in which gaps in the transcripts were capable of being filled, *see id.* at __, 789 S.E.2d at 19 (citing *In re Bradshaw*, 160 N.C. App. 677, 587 S.E.2d 83 (2003), *State v. Owens*, 160 N.C. App. 494, 586 S.E.2d 519 (2003), and *State v. Hammonds*, 141 N.C. App. 152, 541 S.E.2d 166 (2000), as examples of cases where it was possible to reconstruct an incomplete transcript), there was no way to reconstruct the missing portion of the transcript in the present case. Despite sufficient efforts to reconstruct the transcript, defendant's appellate counsel was only able to verify that cross-examination of the alleged victim did take place. Without any suggestion as to the substance of the missing testimony, the alternative produced by defendant's appellate counsel does not fulfill the same functions as a transcript and is not an adequate alternative.

Having determined defendant made sufficient efforts to reconstruct the missing portion of the transcript and that the alternative is inadequate, we turn to the final step of the inquiry, "whether the lack of an adequate alternative to a verbatim transcript of the [trial] served to deny [defendant] meaningful appellate review such that a new [trial] is required." *Id.* at __, 789 S.E.2d at 20.

Defendant argues the incomplete transcript in this case has denied him meaningful appellate review because the missing transcript includes, at the very least, the cross-examination of the alleged victim, whom defendant contends is the State's chief witness and only eyewitness. Defendant contends that without the alleged victim's testimony the State could not present a *prima facie* case, and without a complete transcript of the alleged victim's testimony, or an adequate alternative, there is no way to identify specific errors below to raise on appeal. Defendant, however, has identified potential issues based on pretrial motions, testimony, and closing arguments. These potential issues include the admission of Rule 404(b) evidence that defendant sought to exclude through a motion *in limine*, the admission of cyber evidence, the admission of evidence of jail records regarding visitation, telephone calls, deposits, and emails related to defendant that the defense sought through a subpoena and were the subject of an objection and motion to

quash by the State, and the admission of evidence of criminal charges against the alleged victim that could have been used to attack her credibility that was the subject of a motion for discovery by defendant, a motion *in limine* by the State, and pre-trial arguments on admissibility that led the trial court to reserve its ruling for trial. Defendant contends that references to particular evidence in the closing arguments, or alternatively, the lack of references to particular evidence, calls into question what rulings the trial court made regarding the above evidence during the unrecorded portion of the trial. Defendant, however, is unable to identify specific errors because there is no transcript.

In response to defendant's argument, the State asserts "[it] is the appellant's responsibility to make sure that the record on appeal is complete and in proper form[,]" *In re L.B.*, 184 N.C. App. 442, 453-54, 646 S.E.2d 411, 417-18 (2007), and that defendant must "demonstrate that the missing recorded evidence resulted in prejudice. General allegations of prejudice are insufficient to show reversible error[,]" *State v. Quick*, 179 N.C. App. 647, 651, 634 S.E.2d 915, 918 (2006) (citations omitted). The State argues defendant's contention that there may have been appealable issues that were not transcribed is not enough because the "allegation does not allege specific prejudice as required." The State claims defendant's argument is based on conjecture and speculation.

In *Shackleford*, this Court rejected a similar argument that the respondent had not demonstrated prejudice because he had not identified specific errors. __ N.C. App. at __, 789 S.E.2d at 21. As in this case, the respondent in *Shackleford* was "expressly contending that the unavailability of a transcript prejudiced him by depriving him of the ability to determine whether any potentially meritorious issues exist for appellate review." *Id.* at __, 789 S.E.2d at 21. This Court explained that

> an appellant would never be able to show prejudice in cases where . . . the absence of a transcript renders the appellant unable to determine whether any errors occurred in the trial court that would necessitate an appeal in the first place. In such cases, the prejudice is the inability of the litigant to determine whether an appeal is even appropriate and, if so, what arguments should be raised.

Id. at __, 789 S.E.2d at 21. This Court ultimately held that the respondent in *Shackleford* had demonstrated prejudice and was unable to obtain meaningful appellate review. *Id.* at __, 789 S.E.2d at 21.

Here, defendant's argument is that he has been denied meaningful appellate review as a result of the incomplete transcript because he does

not know with certainty what happened during the cross-examination of the alleged victim, a critical stage of the trial. Thus, defendant cannot identify errors below that may have affected the outcome of his trial. As stated in *Shackleford*, this inability to identify potential meritorious issues is the prejudice defendant has shown.

Nevertheless, based on the record available in this case, defendant has identified potential issues related to the admissibility of specific evidence which was the subject of pretrial motions and arguments that were likely addressed by the trial court during the portion of the trial that was not transcribed. Given that the transcript is unavailable, this is the best defendant could do after defendant's appellate counsel's efforts to reconstruct the transcript were fruitless. Because the lack of a complete transcript has prevented defendant from identifying errors below, defendant has been prejudiced and has been denied meaningful appellate review. Therefore, defendant is entitled to a new trial.

2. Motion to Dismiss

Defendant also argues the trial court erred in denying his motions to dismiss for insufficiency of the evidence. However, because defendant is entitled to a new trial and any review of the record evidence by this Court would be a review of an incomplete transcript of the evidence presented below, we do not address this issue further.

III. Conclusion

Because meaningful appellate review is impossible in this case absent a verbatim transcript of the trial below, defendant is entitled to a new trial.

NEW TRIAL.

Judges BRYANT and HUNTER, JR. concur.

TOWN OF APEX, PLAINTIFF
v.
BEVERLY L. RUBIN, DEFENDANT

No. COA17-955

Filed 16 October 2018

Jurisdiction—condemnation action—order affecting title and area—mandatory appeal—Rule 59 motion—not a proper substitute

The Court of Appeals did not have jurisdiction to review the denial of plaintiff's motion to reconsider the trial court's determination that a town's eminent domain claim was for a public purpose because the motion was not a proper Rule 59 motion that would toll the thirty-day period for filing notice of appeal. Orders from condemnation proceedings concerning title and area must be immediately appealed; a Rule 59 motion would be proper only upon the discovery of new evidence that was not available at the time of the Section 108 hearing.

Appeal by plaintiff from order entered 24 January 2017 by Judge Elaine M. O'Neal in Wake County Superior Court. Heard in the Court of Appeals 4 June 2018.

Nexsen Pruet PLLC, by David P. Ferrell, for plaintiff-appellant.

Smith Moore Leatherwood LLP, by Matthew Nis Leerberg, and Boxley, Bolton, Garber & Haywood, LLP, by Kenneth C. Haywood, for defendant-appellee.

BRYANT, Judge.

Where the time for filing notice of appeal was not tolled, we find plaintiff's appeal to be untimely. We therefore grant defendant's motion to dismiss plaintiff's appeal and deny plaintiff's petition for writ of certiorari.

Plaintiff Town of Apex filed a condemnation action on 30 April 2015 against defendant Beverly L. Rubin in Wake County Superior Court. Plaintiff sought to acquire an easement across defendant's property and connect sewer access to an adjoining property owned by a private developer.

Before the case went to trial on the issue of just compensation, both plaintiff and defendant filed motions seeking a "Section 108" hearing under N.C. Gen. Stat. § 136-108 in order to determine if the condemnation was for public or private benefit. On 1 August 2016, a Section 108 hearing was held before the Honorable Elaine M. O'Neal, Judge presiding.

At the hearing, defendant contested that plaintiff's interest in her property was for a public purpose "to improve the public utility system of the Town of Apex." Sometime between 2012 and 2013, Parkside Builders, LLC's manager Brad Zadell acquired multiple properties–formally known as Arcadia East–to the east of defendant's property and eventually combined these properties to create the proposed subdivision called Riley's Pond.[1] Zadell applied for Riley's Pond to be annexed into the Town of Apex, which was approved in late 2013. Zadell continued buying property surrounding defendant's home. He purchased approximately twenty-nine acres along the western border of defendant's property and this property became known as Arcadia West. Zadell again petitioned for annexation, which was approved in December 2013.

Plaintiff owned and operated a sewer service in Arcadia West, however, Riley's Pond subdivision did not have a sewer service line at the time because the land was not developed. Nine months prior to plaintiff's approval to acquire a sewer easement on defendant's property, Zadell requested that plaintiff condemn defendant's property so that Riley's Pond could be connected to a sewer line, thereby substantially increasing the value of the land. At various times during the annexation and rezoning process, Zadell offered to purchase either defendant's entire tract or an easement so he could run a sewer to Riley's Pond. Defendant refused those offers.

Zadell met with Public Works and Utilities Director, Timothy Donnelly, to discuss the status of acquiring the easement and requested that plaintiff use its powers of eminent domain. Donnelly then presented the matter to plaintiff. Sometime prior to an Apex Town Council meeting, plaintiff's attorney contacted defendant to inquire about plaintiff purchasing an easement to enable it to provide sewer service to Riley's

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1. We note from the record that Parkside Builders, LLC owned the property to the east of defendant's property. Brad Zadell acted in his official capacity as the manager-owner of Parkside Builders, LLC. On or before 31 December 2014, before condemnation, Parkside Builders, LLC conveyed Riley's Pond to Transom Row Properties II, LLC, which was another company managed by Zadell. For ease of reading, we refer to Zadell and Zadell-managed companies as "Zadell" throughout this opinion.

Pond. Defendant was unwilling to sell, and plaintiff considered alternative locations for the sewer line. Given the topography of the property, plaintiff determined the route through defendant's property was the most appropriate one.

On 10 February 2015, Zadell and plaintiff entered into a contract in which Zadell agreed to be responsible for all costs and expenses associated with plaintiff's efforts to acquire a sewer easement through defendant's property. On 26 February 2015, prior to the Apex Town Council meeting, a purchase contract was prepared in which Zadell agreed to sell Riley's Pond for $2.5 million more than its original purchase price. Five days later, on 3 March 2015, the Apex Town Council approved plaintiff's use of eminent domain to acquire an easement across defendant's property.

On 18 October 2016 following the 1 August Section 108 hearing, Judge O'Neal concluded as a matter of law that the taking was for a private benefit and entered judgment ("Section 108 Judgment"). On 28 October 2016, plaintiff filed a Verified Motion for Reconsideration to Alter, Amend, and/or Seek Relief from Judgment ("Motion for Reconsideration"), citing Rules 59 and 60(b) of the North Carolina Rules of Civil Procedure. The superior court denied this motion by order entered 24 January 2017 (the "Reconsideration Order"). Plaintiff appeals from both the Section 108 Judgment and the Reconsideration Order.

On appeal, plaintiff argues the superior court erred in its conclusion that the plaintiff's claim to defendant's property by eminent domain was for a private purpose. Additionally, plaintiff contends that the superior court erred in denying the Motion for Reconsideration. Defendant argues that plaintiff's Motion for Reconsideration from the Section 108 Judgment did not toll the thirty-day period for filing the notice of appeal, and therefore, plaintiff's appeal from the Section 108 Judgment is untimely. We first address defendant's argument and consider whether this Court has jurisdiction.

Plaintiff filed its notice of appeal on 30 January 2017, which was more than thirty days after the Section 108 Judgment was rendered on 18 October 2016. Accordingly, in order to circumvent the jurisdictional bar to the appeal, plaintiff contends that the Rule 59 Motion for Reconsideration filed on 21 October 2016 tolled the thirty-day period for asserting a timely notice of appeal. We disagree.

Rule 3(c) of the North Carolina Rules of Appellate Procedure provides that a notice of appeal must be filed within thirty days after

entry of a final judgment. N.C. R. App. P. 3(c) (2017). "Appellate Rule 3 is jurisdictional and if the requirements of this rule are not complied with, the appeal must be dismissed." *Currin-Dillehay Bldg. Supply, Inc. v. Frazier*, 100 N.C. App. 188, 189, 394 S.E.2d 683 (1990). North Carolina courts have consistently held that "orders from a condemnation hearing concerning title and area taken are 'vital preliminary issues' that must be *immediately appealed* pursuant to N.C.G.S. § 1-277, which permits interlocutory appeals of determinations affecting substantial rights." *City of Wilson v. Batten Family, L.L.C.*, 226 N.C. App. 434, 438, 740 S.E.2d 487, 490 (2013) (emphasis added) (quoting *Dep't. of Transp. v. Rowe*, 351 N.C. 172, 176, 521 S.E.2d 707, 709 (1999)).

While rulings from a Section 108 hearing are typically interlocutory, an appeal is mandatory as the appropriate remedy for issues involving title and area. *See N.C. State Highway Comm'n v. Nuckles*, 271 N.C. 1, 14, 155 S.E.2d 772, 784 (1967) ("One of the purposes of [a Section 108 hearing is] to eliminate from the jury trial any question as to [the land or area condemned]. Therefore, should there be a fundamental error in the judgment resolving these vital preliminary issues, ordinary prudence requires an immediate appeal, for that is the proper method to obtain relief from legal errors." Therefore, "[w]hen [an] appeal is mandatory, the right will be lost if [the] appeal is not made within thirty days after entry of judgment." *Wilson*, 226 N.C. App. at 438, 740 S.E.2d at 490.

Here, the Section 108 hearing involved whether plaintiff's taking of defendant's property was motivated by a public use or benefit. Plaintiff was afforded the opportunity to present evidence and other supporting documents to rebut defendant's claims of a taking motivated and supported by private interests. Following the hearing, the superior court, considering all the evidence, issued a ruling in favor of defendant. Plaintiff did not immediately appeal but instead filed a Rule 59 Motion for Reconsideration.

Because a Section 108 judgment becomes a final judgment on the issues it addresses if it is not immediately appealed, a *proper* motion for reconsideration under Rule 59 could serve the same purpose if a party to a condemnation action actually discovered new evidence after a Section 108 hearing, and that new evidence would lead to a different determination on the area or interest taken. *See* N.C. Gen. Stat. § 1A-1, Rule 59(a)(4) (2017).

> To qualify as a [proper] Rule 59 motion within the meaning of Rule 3 of the Rules of Appellate Procedure, the motion must "state the grounds therefor" and the grounds stated

> must be among those listed in Rule 59(a). The mere recitation of the rule number relied upon by the movant is not a statement of the grounds within the meaning of Rule 7(b)(1). The motion, to satisfy the requirements of Rule 7(b)(1), must supply information revealing the basis of the motion.

Smith v. Johnson, 125 N.C. App. 603, 606, 481 S.E.2d. 415, 417 (1997) (citations and quotation marks omitted).

Although a Rule 59 motion will toll the time for an appeal, we consider the motion based upon its substance. Notwithstanding the grounds listed in the motion, the substance of plaintiff's filing was not a proper Rule 59 motion. Plaintiff cites to Rule 59 generally in its motion for reconsideration which alleges an attempt to present new evidence; however, that evidence was admittedly available at the time of the Section 108 hearing.

In its motion, plaintiff concedes that "[a]lthough most of the evidence and facts discussed herein existed at the time of the 'all other issues' [Section 108] hearing, it was not known or reasonably anticipated that this evidence would be necessary. But given the [c]ourt's ruling in the matter, the [c]ourt should consider this evidence." Even assuming plaintiff did not reasonably anticipate the evidence needed at the Section 108 hearing, a Rule 59 motion is not intended to be a second bite at the apple where the evidence was in plaintiff's possession or existed at the time of hearing and plaintiff was afforded "every opportunity to argue all relevant issues in a single [Section 108] hearing." *Wilson*, 226 N.C. App. at 439, 740 S.E.2d at 491; *see also N.C. All. for Transp. Reform, Inc. v. N.C. Dep't of Transp.*, 183 N.C. App. 466, 470, 645 S.E.2d 105, 108 (2007) ("Although such deficiency would alone be adequate basis for dismissal of the motion, the trial court also found that petitioners simply sought to reargue matters from the earlier hearing, additionally supporting the court's conclusions that the Motion to Alter or Amend was not a proper Rule 59(e) motion."). Therefore, having determined the substance of plaintiff's Rule 59 motion was not proper, it could not effectively toll the thirty-day notice of appeal. *See* N.C. R. App. P. 3(c).

Accordingly, as the notice of appeal was untimely, plaintiff's appeal from the Section 108 Judgment is dismissed. Because plaintiff attempted to use an improper Rule 59 motion as a substitute for appeal, we will not review an appeal from the denial of such an improper motion. *See Musick v. Musick*, 203 N.C. App. 368, 371, 691 S.E.2d 61, 63 (2010) ("Neither a Rule 59 motion nor a Rule 60 motion may be used as a substitute for an appeal.").

Following oral argument, plaintiff petitioned this Court, on 22 June 2018, to exercise its discretion and grant a writ of certiorari as an alternative means to review the merits of the superior court's judgment. However, we decline to exercise our discretion to allow a writ of certiorari. *See* N.C. R. App. P. 21(a) (2017). Plaintiff's petition for a writ of certiorari is denied.[2]

DISMISSED.

Chief Judge McGEE and Judge STROUD concur.

2. Although dicta, we note for plaintiff's benefit that a review of the superior court's findings of fact and conclusions of law in the Section 108 Judgment appear to be supported by evidence in the record. Further, a review of the underlying record, including the transcript and submissions of evidence, appear to support the superior court's denial of the Motion for Reconsideration.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 OCTOBER 2018)

BAKER v. N.C. PSYCHOLOGY BD. No. 18-264	Durham (16CVS3036)	Affirmed
BROWN v. N.C. DEP'T OF PUB. SAFETY No. 17-1220	N.C. Industrial Commission (TA-20198)	Affirmed
FRADY v. FRADY No. 18-141	Transylvania (16CVD37)	Affirmed in Part; Vacated in Part and Remanded
IN RE M.L. No. 18-5	Buncombe (17SPC50235)	Vacated
IN RE Z.B. No. 18-105	Mecklenburg (17JA155) (17JA157) (17JA211) (17JA212)	Affirmed in part, Vacated in part and Remanded
KING HARBOR HOMEOWNERS ASS'N, INC. v. GOLDMAN No. 17-1301	Onslow (14CVS4011)	Reversed and Remanded
STATE v. ALLEN No. 18-195	Union (13CRS54210-13) (14CRS51267) (14CRS696) (16CRS52748-49) (17CRS385) (17CRS50708)	NO ERROR IN PART, VACATED IN PART, AND REMANDED.
STATE v. BARKER No. 18-178	Wilkes (16CRS50208-09)	No Error
STATE v. CHOPPY No. 18-167	Buncombe (97CRS12460-65) (97CRS63565-69) (97CRS63680)	Affirmed
STATE v. GEDDIE No. 18-332	Pasquotank (12CRS51952) (13CRS19) (13CRS33) (14CRS141) (14CRS142) (17CRS767)	No error in part; dismissed in part.

STATE v. ROBINSON No. 17-1190	Duplin (16CRS51619) (16CRS840)	No Error
STATE v. ROBINSON No. 18-74	Forsyth (15CRS59260-61)	NO PREJUDICIAL ERROR IN PART; VACATED IN PART; REMANDED.
STATE v. TURNER No. 17-1400	Caldwell (13CRS538)	Vacated
STATE v. WEBBER No. 17-1015	Cleveland (14CRS55577-78)	No error in part; Remanded for correction of clerical errors.
STATE v. WILLIAMS No. 17-620	Hoke (14CRS51601) (14CRS51695) (14CRS51696)	VACATED IN PART; NO ERROR IN PART.

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